Law of Contract

Muhammad Ekramul Haque

Published by:
Law Lyceum
Centre for Law, Justice and Peace
84/1 Central Road
Dhanmondi, Dhaka 1205
Bangladesh.

First published: December 2004

Copyright © reserved by the author

Cover design: Mubassher Majumder

ISBN 984 – 32 – 1886 - 0

Price: Taka 350.00
US $ 25

Printed by
Fair Trade Advertising
90/A New Circular Road
Mouchak, Dhaka.
Phone : 9331312

Dedicated to my parents

Salima Begum
&
Late Sultan Uddin Ahmad

PREFACE

The laws relating to contracts in Bangladesh are governed by the Contract Act, 1872 (*Act IX of 1872*). This Act deals with the basic principles of contracts generally and with some specific types of contacts such as indemnity, guarantee, bailment and agency. Initially this Act contained the provisions of law relating to sale of goods and partnership when it was originally enacted in 1872. Subsequently, these two chapters, i.e., Chapter VII on Sale of Goods and Chapter X on Partnership were omitted and two separate Acts of Parliament, i.e, the Sale of Goods Act, 1930 and the Partnership Act, 1932 were passed to deal with these matters.

This book, in fact, attempts a straightforward analysis of the provisions of the Contract Act, 1872. The principles as contained in every section have been analyzed, and cases decided by the Courts in Bangladesh have been cited in appropriate places. Certain English cases have also been discussed since they were considered necessary for easier understanding of the principles and laws.

In arranging the book, I endeavored to divide it in chapters in conformity with the Contract Act, 1872. The First Chapter deals briefly with the Preamble to the Act and the formation of a contract and will give the readers a primary idea about contract and its governing Act in Bangladesh. The Second Chapter discusses 'offer' and 'acceptance' and is the most elaborate chapter of the book. It contains all relevant rules

regarding communications of offer and acceptance. In writing this chapter, I have deliberately cited many English cases for clear understanding of certain complicated legal issues such as the nature of offer and its distinction with 'invitation to treat'. In this Chapter, certain lacuna in the law have also been raised which may inspire the enthusiastic readers to carry out further study and in-depth research on those issues. Chapters Three and Four examine two out of five elements for the enforceability by law of an agreement, i.e., 'capacity of parties' and 'free consent'. The Fifth Chapter explains the laws relating to consideration generally. Chapter Six covers issues relating to legality of object and consideration of a contract. Chapter Seven deals with the last necessary element for the enforceability of an agreement, i.e., statutory legality. In the process, this chapter also contains discussions related to void agreement taking together all relevant sections of the Act in one place. Chapter Eight discusses relevant sections to contingent contract chronologically. The Performance of contract is discussed in Chapter Nine. Chapter Ten, titled Quasi Contract, deals with certain relations resembling those created by contract. Chapter Eleven concentrates on the consequences of breach of contract and includes discussions relating to damages and assessment of damages. Chapters Twelve to Fourteen focus on certain specific types of contracts, i.e., indemnity, guarantee, bailment, pledge and agency. Lastly, the Appendix contains the full text of the Contract Act, 1872 for convenience of readers.

As I have been teaching the law of contract and business/commercial law for years in different universities in MBA and BBA programs apart from LL.B. (honors), I had to depend on books written by Indian and British writers since I got no text on law of contract with reference to Bangladesh laws. Thus I always felt the necessity of writing a book on law of contract from the Bangladesh perspective to meet the demands of our students. Having this end in

mind, I have tried my best to explain the laws embodied in the Act in a lucid way citing relevant Bangladeshi cases so that it could be useful for the Law, BBA and MBA students as well as for the lawyers who are interested in the basic analysis of the provisions incorporated in the Contract Act, 1872.

Today I remember with gratitude all my teachers and especially Barrister Tofailur Rahman, who taught me the Law of Contract in the University of Dhaka when I was a student of 1st year LL.B. (Honors). I also convey my gratitude to Mr. Md. Ershadul Karim who has taken the pain to go through the manuscript and has also suggested significant improvements. I am thankful to Barrister Nawshad Zamir, Barrister Tanveer Parvez, Barrister Shahjada Al Amin Kabir, Manzur Alam and my colleagues Dalia Pervin, Md. Towhidul Islam and Md. Nazmujjaman Bhuian who gave me important suggestions at different times in writing the book. I am grateful to Advocate Parvez Hossain whose energetic support was instrumental in printing the book. I am grateful also to my wife Afsana and my little son Zayed Ekram who have been a continuous source of support and inspiration for me.

Finally, I would like to thank all who have helped me to make this book as much error-free as possible. However, if any problem remains, the responsibility is entirely mine and I would like to implement the corrections and further suggestions in the next edition.

Muhammad Ekramul Haque
Lecturer
Department of Law
University of Dhaka
Dhaka 1000
Bangladesh.

CONTENTS

Preface
Contents, ix-xxvi
List of Cases, xxvii-xxxii

CHAPTER 1
Preamble and formation of a contract , 1-14

Preamble: Object of the Contract Act, 1872, 1
Scheme of the Contract Act, 1872, 2
Scope of the Contract Act, 1872, 3
Conflict of laws, 3
Formation of a contract, 3
Types of contracts, 10
As regards the mode of creation, 10
- Express contract , 10
- Implied contract, 10

As regards the enforceability and validity, 11
- Valid contract, 11
- Voidable contract, 11
- Void contract, 12

Void agreement, 13
Distinction between void agreement and void contract, 13
Illegal agreement, 13
Illegal contract, 14
Unenforceable contract, 14

CHAPTER 2
Proposal and acceptance, 15-72

Definition of 'Proposal', 15
Characteristics of a proposal, 18
Offer and Invitation to Treat, 24
    Auction sales, 27
    Tenders, 28
    Display of goods, 32
    Advertisements, 35
    Timetables and boarding on bus or train, 37
Communication of offer, 39

What is acceptance?, 40
    Rules regarding a valid acceptance, 41
    Nature and mode of acceptance, 41
    Manner of acceptance, 43

Counter offer, 45
    Meaning of counter offer, 45
    Legal consequence of counter offer, 46

Knowledge of offer: prior condition of acceptance, 47
Acceptance by performance, 50
Inferring acceptance from conduct, 53

Rules regarding communication of proposal, acceptance and revocation, 54
    Communication of proposal, 55
    Communication of acceptance, 56
        First phase of communication, 56
        Second phase of communication, 57
    Communication of offer and acceptance by telephone, 58
        Postal rule of communication, 62

Difference between Bangladeshi law and English law, 63
When does the contract become complete?, 63
Communication of revocation, 65
How is a communication made?, 65
Revocation of offer, 66
When can an offer be revoked?, 66
How can an offer be revoked?, 66
By notice, 67
By lapse of time, 68
By non-fulfillment of condition precedent, 70
By death or insanity, 71
Revocation of acceptance, 71
When can an acceptance be revoked?, 71

CHAPTER 3
Capacity of parties , 73-87

Qualifications of the parties, 73
Contract in *lucid interval*, 76
Agreement by a person of unsound mind, 77

Minor's agreement, 78
Who is a minor?, 78
Can a minor enter into a contract?, 78
Nature of Minor's Agreement, 78
Application of doctrine of 'estoppel' against minor, 79
Meaning of 'estoppel', 79
Is it applicable against the minor?, 80
Reason for non-applicability of 'estoppel' against minor, 81
Doctrine of 'Restitution', 81
Ratification of minor's agreement, 81

Beneficial Contracts, 82
Contracts of Apprentice or of service, 83
Liability for Necessaries, 83
Meaning of 'necessaries', 84
Nature of Liability of minor for necessaries, 87
Nature of liability, 87
Extent of liability, 87
Exception, 87

CHAPTER 4
Free Consent, 88-113

Meaning of 'consent', 88
Meaning of 'free consent', 89
Coercion, 90
Substantial element, 90
Psychological element, 91
Undue influence, 91
Ingredients of undue influence, 93
Nature of relationship, 93
Use of relation, 93
Presumption of undue influence and the burden of proof, 95
Effect of undue influence, 98
Fraud, 98
Ingredients of fraud. 100
Psychological element, 100
Substantial element, 100
Does mere silence amount to fraud?, 102
Misrepresentation, 103
Types of misrepresentation, 103
Unwarranted false statement, 104
Breach of duty, 104
Causing mistake as to the subject matter, 104

Effect of coercion, misrepresentation and fraud, 105
Additional option in case of fraud and misrepresentation, 106
Conditions to be fulfilled to make a contract voidable on the ground of misrepresentation and fraud, 107
Doctrine of *caveat emptor*, 108
Mistake, 110
Different types of mistake, 111
Mistake of fact, 111
Mistake of law, 112
Unilateral mistake, 112
Bilateral mistake, 112
Legal consequences of mistake, 112

CHAPTER 5
Consideration, 114-125

Meaning of consideration, 114
Essence of consideration, 115
Consideration may move from any person, 116
Types of consideration, 117
Executory consideration, 118
Executed consideration, 118
Past consideration, 118
Necessity of consideration, 119
contracts without consideration, 119
Adequacy of consideration, 123

CHAPTER 6
Legality of object and consideration, 126-139

Meaning of object and consideration, 126
Provisions regarding legality of object and consideration, 127
Which considerations and objects are not lawful?, 127
Forbidden by law, 129
Defeat the provision of any law, 129
Fraudulent, 130

Injury to the person or property of another, 130
Case references from DLR on section 23, 137
Legal consequences of agreements where considerations and objects are unlawful in part, 138

CHAPTER 7
Void agreements, 140-163

What is void agreement?, 140
Different types of void agreement, 144
Agreement in restraint of marriage, 144
Agreement in restraint of trade, 145
Ambit of section 27, 146
Absolute restraint, 147
Agreements not in restraint of trade, 147
Agreements in restraint of legal proceedings, 148
Conditions, 149
Cases from DLR on section 28, 151
Exceptions to section 28, 155
First Exception, 155
Second Exception, 155
Agreements the meaning of which uncertain, 157
Agreements by way of wager, 159
Agreements contingent on impossible events, 161
Analysis of section 36, 161
Agreements to do impossible acts, 162
Types of impossibility, 162
Compensation for loss in such a void agreement , 162

CHAPTER 8
Contingent contracts, 164-171

What is contingent contract?, 164
Elements of contingent contract, 164
Enforcement of contracts contingent on an event happening, 166

Enforcement of contracts contingent on an event not happening, 167
When event on which contract is contingent to be deemed impossible, 168
Contracts contingent on happening of specified event within fixed time, 169
Agreements contingent on impossible events, 170

CHAPTER 9
Performance of contract, 172-224

Contracts which must be performed, 172
Principles laid down by section 37: obligation of the parties, 173
Liability of the representatives of the promisors, 174
Rules regarding offer of performance, 175
Legal consequence of offer of performance, 176
Liability of the promisor, 177
Rights of the promisor, 177
Offer made to one of several joint promisees, 177
Conditions of a valid offer of performance, 177
Nature of the offer of performance, 178
Time of the offer, 178
Place for making such an offer, 178
Two opportunities, 178
Opportunity to see the ability, 178
Opportunity to see the quality of the goods, 179

Anticipatory breach of contract: refusal to perform, 179
By whom Contracts must be Performed, 181
The promisor himself , 182
Any competent person , 182
Effect of accepting performance from third person, 183
Rules regarding the performance of joint promises,. 184
Devolution of joint liabilities, 184

Condition for the application of above rule, 185
Compelling any joint promisor to perform, 186
Each promisor may compel contribution, 186
Sharing of loss by default in contribution, 186
Effect of release of one joint promisor by the promisee, 187
Devolution of joint rights, 188

Time and place for performance, 189
Where no application is to be made and no time is specified, 187
Where time is specified and no application to be made, 189
Application for performance on certain day to be at proper time and place, 190
Where no application to be made and no fixed place, 191
Performance as prescribed or sanctioned by promisee, 191

Performance of reciprocal promises, 192
Condition of performance, 192
Order of performance of reciprocal promises, 193
Liability of party preventing event on which the contract is to take effect, 194
Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises, 195

Effect of failure to perform at fixed time, 197
Effect of such failure when time is essential, 197
Effect of such failure when time is not essential, 197
Effect of acceptance of performance at time other than that agreed upon , 198
Reciprocal promise to do things legal, and also other things illegal, 201

Alternative promise, one branch being illegal, 202
Appropriation of Payments, 202
Application of payment where debt to be discharged is indicated, 202
Application of payment where debt to be discharged is not indicated,203
Application of payment where neither party appropriates, 204

Contracts which need not be performed, 205
Effect of novation; rescission and alteration of contract, 205
Promisee may dispense with or remit performance of promise, 207
Consequences of rescission of voidable contract, 210
Discharge from the liability, 210
Restoration of the benefit received, 210

Obligation of person who has received advantage under void agreement or contract that becomes void, 210
Restoration of advantage, 212
Making compensation, 212
Mode of communicating or revoking rescission of voidable contract, 213

Effect of neglect of promisee to afford promisor reasonable facilities for performance, 213

Performance of contract and supervening impossibility, 214
Conditions for supervening impossibility under section 56, 215
Subsequent impossibility, 215
Promiosr's inability, 215
Grounds for supervening impossibility, 216
Cases from DLR relating to section 56, 217

CHAPTER 10
Of certain relations resembling those created by contract, 225-229

Claim for necessaries supplied to person incapable of contracting, or on his account, 225
Reimbursement of person paying money due by another in payment of which he is interested, 226
Obligation of person enjoying benefit of non-gratuitous act, 227
Liability of person to whom money is paid or thing delivered, by mistake or under coercion, 228

CHAPTER 11
Consequences of breach of contract, 230-248

Compensation for loss or damage caused by breach of contract, 230
Rules enunciated by section 73, 236
For which compensation may be claimed, 236
For which compensation cannot be claimed, 236
Meaning of remoteness of damage, 237
Rule regarding assessment of damage, 238
Duty to mitigate the loss, 238
Cases from DLR on section 73, 239
Compensation for breach of contract where penalty stipulated for, 224
Party rightfully rescinding contract entitled to compensation, 248

CHAPTER 12
Indemnity and guarantee, 249-273

Laws relating to contract of indemnity, 249
Definition of a contract of indemnity, 249
Elements of a contract of indemnity, 249
Nature of the transaction, 250
Object, 250

Parties in contract of indemnity : Indemnifier and indemnity holder, 250
Rights of indemnity-holder when sued, 252
Damages, 253
Costs of the suit, 253
Sums paid under the terms of any compromise, 254
Laws relating to contract of guarantee, 254
Meaning of a contract of guarantee, 254
Elements of a contract of guarantee, 255
Nature of the transaction, 255
Nature and object of the contract, 255
Modes of a contract of guarantee, 255
Parties to a contract of guarantee, 255
Surety, 255
Principal debtor, 255
Creditor, 255
Consideration for guarantee, 256
Surety's liability, 256
Meaning of continuing guarantee, 257
Revocation of continuing guarantee, 258
Revocation of continuing guarantee by notice, 258
Revocation of continuing guarantee by death, 259
Joint debtors and suretyship, 259
Analysis of section 132, 260
Discharge of surety, 260
Discharge of surety by variance in terms of contract, 260
Discharge of surety by release or discharge of principal debtor, 263
Discharge of surety when creditor compounds with, gives time to, or agrees not to sue principal debtor, 263
Surety not discharged when agreement made with third person to give time to principal debtor, 264

Creditor's forbearance to sue does not discharge surety, 264
Release of one co-surety does not discharge others, 265
Discharge of surety by creditor's act or omission impairing surety's eventual remedy, 265
Rights of the sureties, 266
Rights of surety on payment or performance, 266
Surety's right to benefit of creditor's securities, 267
Certain rules regarding the validity and invalidity of a contract of guarantee, 268
Guarantee obtained by misrepresentation invalid, 268
Guarantee obtained by concealment invalid, 269
Conditional guarantee on joining of another co-surety, 270
Implied promise to indemnify surety, 270
Liability of co-sureties, 271
Co-sureties liability to contribute equally, 271
Liability of co-sureties bound in different sums, 272

CHAPTER 13
Bailment and pledge, 274-307

Meaning of bailment, 274
Elements of bailment, 274
Subject matter, 274
Delivery, 275
Mode of delivery, 275
When such delivery is not required, 275
Purpose, 276
Contract, 276
Content of contract: provision of returning the goods, 277
Duties of bailor, 277
Duty of disclosure, 277
Bailor is aware of the faults in the goods, 277

Consequence of non-disclosure of such fault, 278
Bailor is not aware of the faults in the goods, 278
Duty of repayment of necessary expenses, 279
Duty to indemnify the borrower , 279
Duty to indemnify the bailee, 280
Duty to receive back the goods bailed, 280
Duty to compensate the bailee, 281

Rights of bailee, 281
Bailee's right of particular lien, 281
Bailee's right of general lien, 284
Right regarding delivery of goods to one of several joint bailors, 285
Right regarding delivery of goods to bailor without title, 286
Right to claim damages for non-disclosure of the faults in the goods bailed, 286
Right to claim payment for necessary expenses, 288
Right to be indemnified by the bailor, 288
Right to claim compensation for safe custody, 288

Duties of bailee, 288
Duty of care, 288
Using the goods according to the conditions of bailment, 292
No mixture without bailor's consent, 293
Mixture of the goods which can be separated, 294
Mixture of the goods which can not be separated, 294
Duty of return of goods, 294
Duty to deliver any increase or profit, 295

Rights of bailor, 296
Right to claim compensation for non-delivery of goods at proper time, 296

Right to terminate the bailment, 296
Right to demand return of goods, 297
Right to claim compensation, 297
Right to claim return of goods, 298
Right to claim any increase or profit, 298

Rights of bailors and bailees against wrong doers, 298
Suit against wrong doer, 298
Apportionment of relief or compensation, 299

Termination of bailment, 299
Expiry of time, 299
Fulfillment of object, 299
Option of the bailor, 299
If the bailee does any unauthorized act, 299
Gratuitous bailment, 299
By operation of law, 300

Bailments of Pledges, 300
What is pledge?, 300
Pawnee's right of retainer, 300
Pawnee not to retain for debt or promise other than that for which goods pledged : Presumption in case of subsequent advances, 301
Pawnee's right as to extraordinary expenses incurred, 302
Pawnee's right where pawnor makes default, 302
Defaulting pawnor's right to redeem, 305
Pledge by mercantile agent, 305
Pledge by person in possession under voidable contract, 305
Validity of pledge where pawnor has only a limited interest, 306

Laws relating to finder of goods, 306
Responsibility of finder of goods, 306

Right of finder of goods, 306
Right to sell it, 306

CHAPTER 14
Agency, 308-350

Appointment and Authority of Agents, 308
Who is an agent?, 308
Who is the 'principal'?, 309
What is 'agency'?, 309
Who may employ an agent?, 309
Who may be an agent?, 310
Necessity of consideration, 311
Agent's authority, 311
Nature of the agent's authority, 311
Express authority, 311
Implied authority, 311
Extent of agent's authority, 312
Agent's authority in an emergency, 313

Laws relating to sub-agent, 314
Delegation of agency, 314
Who is a sub-agent?, 314
Legal consequences of appointment of sub-agents properly, 315
Representation of principal by sub-agent properly appointed, 315
Agent's responsibility for sub-agent, 316
Sub-agent's responsibility, 316
Liability to the agent, 316
Liability to the principal, 316
Legal consequences of appointment of sub-agent without authority,316
Relation between principal and person duly appointed by agent to act in business of agency, 317
Agent's duty in naming such person, 318

Agency by Ratification, 319
Right of person as to acts done for him without his authority: Effect of ratification, 320
Types/modes of ratification, 320
Knowledge requisite for valid ratification, 321
Effect of ratifying unauthorized act-forming part of a transaction, 321
Ratification and third party rights, 322

Revocation of Authority, 322
Termination of agency, 322
Termination of agency where agent has an interest in subject-matter, 323
When principal may revoke agent's authority, 324
Revocation where authority has been partly exercised, 325
Compensation for revocation by principal or renunciation by agent, 326
Notice of revocation of renunciation, 326
Revocation and renunciation may be expressed or implied, 327
When termination of agent's authority takes effect as to agent, and as to third persons, 327
Agent's duty on termination of agency by principal's death or insanity, 328
Termination of sub-agent's authority, 329

Agent's Duty to Principal, 329
Agent's duty in conducting principal's business, 329
How will the agent conduct the business of his principal?, 330
An agency where the principal has given directions, 330
An agency where the principal has not given directions, 330

Consequence of violation of above rules, 330
Duty to compensate, 330
Account for profit, 330
Skill and diligence required from agent, 331
Agent's accounts, 333
Agent's duty to communicate with principal, 333
Right of principal when agent deals, on his own account, in business of agency without principal's consent, 334
Principal's right to benefit gained by agent dealing on his own account in business of agency, 335
Agent's right of retainer out of sums received on principal's account, 335
Agent's duty to pay sums received for principal, 336
When agent's remuneration becomes due, 336
Agent not entitled to remuneration for business misconducted, 337
Agent's lien on principal's property, 338

Principal's Duty to Agent, 338
Agent to be indemnified against consequences of lawful acts, 338
Agent to be indemnified against consequences of acts done in good faith, 339
Non-liability of employer of agent to do a criminal act, 340
Compensation to agent for injury caused by principal's neglect, 340

Effect of Agency on Contracts with Third Persons, 341
Enforcement and consequences of agent's contracts, 341
Principal how far bound, when agent exceeds authority, 341

Principal not bound when excess of agent's authority is not separable, 343
Consequences of notice given to agent, 343
Agent cannot personally enforce, nor be bound by, contracts on behalf of principal, 344
Rights of parties to a contract made by agent not disclosed, 347
Performance of contract with agent supposed to be principal, 348
Right of person dealing with agent personally liable, 348
Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable, 349
Liability of pretended agent, 349
Person falsely contracting as agent not entitled to performance, 349
Liability of principal inducing belief that agent's unauthorized acts were authorized, 349
Effect, on agreement of misrepresentation or fraud by agent, 350

APPENDIX

The Contract Act, 1872 353-455

Word Index, 457-464

LIST OF CASES

	Page(s)
Abdul Gani Sheikh Vs. Jagadish Chandra Mridha and others. 2 BLC 121.	4
Abdul Hamid Vs. Abbas Bhai (1962) 14 DLR (SC) 24.	199
Abdul Jalil Chowdhury Vs. Muhammadi Steamship Company Limited (1961) 13 DLR (SC) 214.	18, 209
Abdul Momen Bhuiyan Vs. Hazi Payer Ali Mia 43 DLR 97.	207
Abdul Mutalib Vs. Musammat Rezia Begum (1970) 22 DLR (SC) 134.	220
Abdul Rahim Sardar Vs. Idris Ali Bepari (1959) 11 DLR 169.	199
Abdul Razzak Vs. East Asiatic Co., (1952) 5 DLR 394.	152
Abdun Naim Parvez (Md) Vs. Sachindra Kumar Mandal and others, 5 *BLC* 14.	325
Abul Hashem Khan Vs. Shamsuddin Khan (1989) 41 DLR 415.	206
Abul Hossain Vs. Farooq Sobhan & ors. 4 BLC (AD) 241.	97
Acker Rahman Vs. Province of East Benga, (1954) 6 DLR 93.	203
Adams Vs. Lindsell, 1818, 1 B & Ald 681.	62, 64
Al Haj Kutubuddin Ahmed Vs. Abu Jafar (1962) 14 DLR 128.	219
Amanullah Vs. M/s. Karnaphuli Paper Mills Ltd., (1971) 23 DLR 207.	212
Argbats Aktiebolaget Bohuslanaka Kusten Vs. Central Hardware Stores (1969) 21 DLR (SC) 245.	346
Ashraf Ali Vs. Etim Ali (1959) 11 DLR 185.	82
Ashutosh Basak Vs. S. M. Rahmatulla (1966) 18 DLR 578.	158
Azizur Rahman Vs. Abdus Sakur (1984) 36 DLR (AD) 195.	217
Badu Vs. Badarannesa (1919) 29 C.L.J. 230.	145
Bainbridge Vs. Firmstone (1838) 8 A & E 743.	116
Baka Gopal Basak Vs. Kafiluddin Chowdhury (1959) 11 DLR 125.	113
Balfour Vs. Balfour (1919) 2 K.B. 571 CA.	18

Bangladesh Air Service (Pvt) Ltd. Vs. British Airways (1997) 49 DLR (AD) 187. 156
Bangladesh Muktijoddha Kalyan Trust represented by the Managing Director Vs. Kamal Trading Agency and others (1998) 50 DLR (AD) 171. 5, 44
Banko de Portugal Vs. Waterlow & Sons Ltd., 1932 AC 452. 247
Barnes & Co Vs. Toye (1884) 13 QBD 410. 86
Barry Vs. Davies (Trading as Heathcote Ball & Co) 1 WLR, 1962, *Court of Appeal.* 28
Bengal Metro Engineering Co. Vs. Agrani Bank (1994) 46 DLR 168. 303
Bepin Vs. Chunder Seekur Mookherjee (1880) 5 Cal. 811. 253
Bhagwandas Goverdhandas Kedia Vs. Girdhalal Parshottamdas, AIR 1966 SC 543. 58
Bindu Mukhi Vs. Sm. Sarda Sundari (1954) 6 DLR 97. 95, 96
Blackpool and Fylde Aero Club Ltd. Vs. Blackpool Borough Council, 1990, 1 WLR 1195, Court of Appeal. 32
Bloom Vs. American Switch Watch Co., (1915) App D 100. 50
British Car Auctions Ltd. Vs. Wright, 1972, 1 WLR 1519. 27
British India Steam Navigation Co. Vs. A. R. Chowdhury (1967) 19 DLR 54. 153
British Westinghouse Co Vs. Underground Electric Rly Co., 1912 AC 673. 247
Brogden Vs. Metropolitan Rly Co., (1877) 2 App Cas 666. 53
Carlill Vs. Carbolic Smoke Ball Company, 1892, 2 QB 484. 20, 36, 51
Carlisles, Nephews & Co. Vs. Ricknauth Bucktearmull (1882) 8 Cal. 809. 148
Central Bank of India Ltd. Vs. Messrs. Jan Muhammad Haji Ismail (1965) 17 DLR 582. 135, 291
Central Exchange Bank Ltd. Vs. Zaitoon Begum (1968) 20 DLR (SC) 117. 268
CF Spencer Vs. Arding , 1870, LR 5 CP 561. 36
Chairman, Rly Board Vs. Commerce Bank Ltd., (1994) 46 DLR 254. 290
Chandpur Mills Ltd. Vs. Official Liquidator Economic Aid Corporation (1960) 12 DLR 25. 218
Chapleton Vs. Barry UDC (1940) 1 KB 532. 35
Chappel Vs. Copper (1844) 13 M & W 252, 258. 85
Chinaya Vs. Ramaya (1882) 4 Mad 137; 6 Ind Jur 402. 117
Chittagong Port Authority Vs. Hongkong Shipping Lines (1989) 41 DLR 332. 289

Chittagong Port Authority Vs. Md. Ishaque (1983) 35 DLR (AD) 364. 290
Currie Vs. Misa (1875) LR 10 Exch 153. 115
D. P. Goenka Vs. Governor General of Pakistan, (1955) 7 DLR 134. 289
Daulat Ltd. Vs. Pubali Bank, 39 DLR 243. 122
Daulatpur Traders and Co., Ltd. Vs. The Eastern Federal Union Insurance Co. Ltd., (1990) 42 DLR 125. 162
Dula Mia Vs. Haji Md. Ebrahim (1956) 8 DLR 616. 136, 198
Dunlop Vs. Higgins, 1848, 1 HLC 381. 62
East and West Steamship Co. Vs. Hossain Brothers (1967) 19 DLR 75. 346
Entores Ltd Vs. Miles Far East Corpn., (1955) 2 QB 327, 1955 All ER (vol.2) 493. 58, 60
Federation of Pakistan Vs. Dawood Corporation (1958) 10 DLR 258. 229
Felthouse Vs. Bindley, 1862, 11 CBNS 869. 52
Fenwick Vs. Macdonald, Fraser & Co., 1904, 6 F (Ctof Sess) 850. 28
Fisher Vs. Bell, 1961, 1 QB 394; 1960, 3 All ER 731 at 733. 33
Fitch Vs. Snedaker, 1868, 38 NY 248. 48
Frost Vs. Knight (1872) L.R. 7 Ex. 111. 180
General American Insurance Co. Ltd. Vs. Mandanlal Sonulal (1935) 59 Bom 656. 83
Gibbons Vs. Proctor, 1891, 64 LT 594. 49, 50
Gibson Vs. Manchester City Council, 1979, 1 All ER 972; 1979, 1 WLR 294. 25
Gladstone Vs. A.B.M. Shayesta Khan (1976) 28 DLR 345. 69
Grainger & Son Vs. Gough (1896) AC 325 at 334. 36
Habibullah, Director of National Bank Limited and 11 others Vs. Bangladesh Bank and another, 2 BLC 520. 259
Hadely Vs. Baxendale (1854) 9 Exch 341. 237
Haji Abdul Karim Vs. Sh. Ali Mohr (1959) 11 DLR (SC) 313. 132
Haji Abdullah Khan Vs. Nisar Muhammad Khan (1965) 17 DLR (SC) 481. 130
Harris Vs. Nickerson, 1873, LR 8 QB 286. 28
Harvela Investments Ltd. Vs. Royal Trust Company of Canada (CI) Ltd., (1986) AC 207. 29, 31
Harvey Vs. Facey (1893) AC 552. 23
Hegge And Co. (Pak.) Ltd, Chittagong Vs. Arag Limited (1967) 19 DLR 24. 347
Hossain Ali Khan Vs. Firoza Begum (1969) 21 DLR 9. 130
Hutchison Telecom Bangladesh Ltd. Vs. Bangladesh Telegraph and Telephone Board and others (1996) 48 DLR (AD) 30. 243

Hyde Vs. Wrench. 1840. 3 Beav 334 47
Inder Singh Vs. Parmeshwardhari Singh. AIR 1957 Pat 491. 76
Irfan Sayed (Md) Vs. Rukshana Matin. 1 BLC (AD) 67. 138
Islamic Republic of Pakistan Vs. Nazar Din Khattak. 21 DLR (Peshwar) 313. 157
Jalal Ahmed Vs. Thorais Mia (1968) 20 DLR 80. 183
James Fialay PLC Vs. Mesbahuddin Ahmed (1994) 46 DLR 624. 246
Julhash Mollah (Md) And Another Vs. Ramani Kanta Malo and another (1995) 47 DLR (AD) 35. 82
Kamisetti Subbiah Vs. Katha Venkataswamy (1903) ILR 27 Mad 355. 64
Kanhaiyalal Indernal Vs. Dineshchandra Mahesh Kumar, A.I.R. 1959 M.P. 234. 62
Kapurji Magniram Vs. Panaji Devichand. 53 Bom. 110. 363
Kennedy Vs. Thomassen. 1929. 1 Ch 426. 44
Lakshmandas Vs. Lane (1904) 32 Bom. 356; 348
Laksman Mandal Vs. Muslem Uddin (1953) 10 DLR 165. 182
Lal Mia Vs. Abdul Gani (1953) 5 DLR 338. 133
Lalman Shukla Vs. Gauri Datt. 1913. 11 All LJ 489. 48
Lasky Vs. Economy Grocery Stores. 319 Mass 224,65 NE 2d 305. 1946. 35
Leslie (R) Ltd. Vs. Sheill (1914). 8 Term Rep 335. 81
M A Chowdhury Vs. Murri Mitsui O.S.K Lines Limited. 22 DLR (SC) 334. 151
M/S. A. Z. Company Karachi Vs. M/S. S. Maula Buksh Muhammad Bashir. Karachi (1965) 17 DLR (SC) 404. 241
M/S. Amin Jute Mills Vs. M/S. A. R. A. G., (1976) 28 DLR (SC) 76. 242
M/s. Begum Mills Vs. Arag Ltd., (1974) 26 DLR 329. 220
M/s. Jamiruddin Pradhan Vs. Federation of Pakistan (1957) 9DLR 99. 290
M/S. Muhammad Amin Muhammad Bashir Ltd. Vs. M/S. Muhammad Amin Brothers Ltd., (1969) 21 DLR (WP) 238 243
M/S. Trans Oceanic Steamship Co. Ltd. Vs. Abdul Rahman (1961) 13 DLR 585. 239
Mackenzie Vs. Striramiah (1890) 13 Mad. 472. 475. 147
Madhub Chander Vs. Raj Coomar (1874) 14 BLR 76. 146
Manzoor Hussain & others Vs. Wali Muhammad & others (1965) 17 DLR (SC) 369. 132
Md. Abdul Kasem Vs. Mofizuddin Shah (1965) 17 DLR 435. 134
Md. Azam Khan Vs. Akhtarunnessa Begum (1957) 9 DLR (WP) 19. 135
Md. Obaidul Akbar Vs. East Pakistan Co-Operative Bank (1975) 27 DLR 523. 304

Md. Sama Mondol Vs. Md. Ahmed Sheikh (1962) 14 DLR 709. 165
Mohan Bashi Saha Vs.United Industrial Bank (1968) 20 DLR 9. 95
Mokbul Hossain Khondker Vs. Jaheda Khatoon (1969) 21 DLR (WP) 362. 215
Montreal Gas Co. Vs. Vasey, 1900, A.C. 595. 20
Moqbul Brothers and another Vs. Rupali Bank and others, 5 BLC 565. 262
Moti Mia Vs. Ayesha Khatun (1996) 48 DLR (AD) 64. 133
Muhammad Meah Vs. Pubali Bank (1989) 41 DLR (AD) 14. 282
Muhuri Bibi Vs. Dharmadas Ghose (1903) 30 IA 114; 30 Cal 539. 79, 82, 143
Nagendra N. Majumder Vs. Khitish Chandra Ghose (1957) 9 DLR 661. 207
Nash Vs Inman (1908) 2 KB 1. 86
Noor Ahmad Vs. Md. Shafi (1970) 22 DLR (WP) 39. 207
Osaka Shosen Koisha O. S. K Line Vs. Province of East Pakistan (1965) 17 DLR 659. 154
P. K. Basak Co. Vs. Gossen & Co., (1960) 9 DLR 1. 136
Pakistan Mercantile Corporation Ltd. Vs. Madan Mohan Oil Mills (1966) 18 DLR 437. 242
Pakistan Vs. M/S. Adamjee Jute Mills Ltd., (1970) 22 DLR 741. 291
Parker Vs. Lewis (1873) L.R. 8 Ch. 1035. 254, 263
Peters Vs. Fleming (1840) 6 M & W 42 at 46-47. 85
Pharmaceutical Society of Great Britain Vs. Boots Cash Chemists (Southern) Ltd., 1952, 2 QB 795; 1952, 2 All ER 456, affd (1953) 1 QB 401, (1953) 1 All ER 482. 33
Pickard Vs. Sears, 1831, A & E 468. 80
Pitt Vs. PHH Asset Management Ltd., (1994) 1 WLR 327, at p. 332. 124
Poosathurai Vs. Kannappa Chettiar (1919) L.R. 47 I.A. 1, 43 Mad. 546. 96
Probodh Chandra Barman Vs. Abdul Rahman Abdul Gani (1960) 12 DLR 459. 251
Province of West Pakistan Vs. M/S. Mistri Patal & Co., (1969) 21 DLR (SC) 132. 247
Province of West Pakistan Vs. M/S. Saaz And Co., (1964) 16 DLR (SC) 511. 240
Purnendu Kumar Das Vs. Hiran Kumar Das (1969) 21 DLR 918. 99, 137, 198
Quenrduaine Vs. Cole, 1883, 32 WR 185. 44
R Vs. Clarke, 1927, 40 CLR 227. 48, 49
Radha Ballav Basak Vs. Krishna Sundari Basak. 134
Raj Rani Vs. Prem Adib, AIR 1949 Bom 215. 83

Ratanlal Vs. Brijmohan (1931) 33 Bom. L. R. 703. 180
Re Casey's Patents (1892) 1 ch. 104, 115. 118
Read v. Anderson (1884) 13 Q.B. 779, 783. 326
Riasatulla Vs. The Tripura Modern Bank Ltd., (1968) 20 DLR 44. 122
Rupali Bank V. Haji Ahmed Sabur (1991) 43 DLR 464. 285
S. S Fazli Vs. M/S Star Film Distributor (1964) 16 DLR (SC) 198. 113
Sadagopa Ramanjiah Vs. Mackenzie (1891) 15 Mad. 79. 148
Sadharan Bima Corporation Vs. Bengal Liner Ltd. and another. (1996) 48 DLR (AD) 143. 244
Sadharan Bima Corporation Vs. Dhaka Dyeing and Manufacturing Co. Ltd., (1991) 43 DLR 286. 156
Sahana Chowdhury (Widow) and others Vs. Md Ibrahim Khan and another, 6 BLC (AD) 67. 57
Shah Pasand Khan Vs. Ihsan (1969) 21 DLR (WP) 362. 212
Sindha Vs. Abraham (1859) 20 Bom. 755; cf. (1918) 20 Bom. L.R. 441. 118
Sonali Bank Vs. Bengal Liner Ltd., (1989) 42 DLR 487. 285
Sonali Bank Vs. Hare Krishna Das and others, 1997 49 DLR 282 257
Stevension Vs. Mclean, 1880, 5 QBD 346. 46
Tar Muhammad & Co. Vs. Federation of Pakistan (1957) 9 DLR 197. 153
Tarain Ch Gupta Chowdhury Vs. Jagannath Rice Mills (1951) 3 DLR 23. 58
Tarani Chowdhury Vs. Jaganath Rice Mills (1951) 3 DLR 23. 239
Thomas Vs. Thomas (1842) 2 QB 851. 115
Timothy Vs. Simpson, 1834, 6 C & P 499 at 500. 33
Tinn Vs. Hoffmann Co., 1873, 29 LT 271. 44
Trang Ice and Cold Storage Company Ltd. Vs. Amin Fish Farm, (1996) 46 DLR 39. 239
Tripura Modern Bank Ltd. Vs. Elahi Baksha (1966) 18 DLR 498. 122
Warlow Vs. Harrison, 1859, 1 E & E 309. 28
Wilkie Vs. London Transport Board (1947) 1 All ER 258. 38
Williams Vs. Carwardine, 1833, 5 C & P 566. 50
Yates Building Co. Ltd Vs. R J Pulleyn & Sons (York) Ltd, (1975) 119 Sol Jo 370. 44
Yeoman Credit Ltd., Vs. Latter (1961) 1 WLR 828. 249

CHAPTER 1

PREAMBLE AND FORMATION OF A CONTRACT

The first Chapter will focus on the preamble of the Contract Act, 1872 (*Act No. IX of 1972*) and the formation of a contract generally. The governing Act in Bangladesh in the field of law of contract is the Contract Act, 1872. It starts with a preamble. It is the traditional mode of the law passed by the parliament that it starts with a preamble which basically contains the object of that particular law. The Contract Act, 1872, is not an exception to this general rule since it also contains a preamble.

Preamble: Object of the Contract Act, 1872:

The Preamble to the Act states that the objects of the Contract Act, 1872, are-

i. *to define certain parts of the law relating to contracts; and*

ii. *to amend certain parts of the law relating to contracts.*

The object implies that this is not a law first of its kind in this field in Bangladesh. Because it speaks also about amendment of certain parts of the law relating to contracts. So it is understood from the wording used in the Act that already there were some laws in this field but this is a new

version of its kind which ensures certain amendment of the existing laws in this field and as such ensures a set of better laws in the codified form relating to contracts.

Scheme of the Contract Act, 1872:

The contents of the Act can be divided into two broad categories:

1. **General laws relating to contract;**
2. **Laws relating to some particular types of contracts.**

Again each of these categories can be divided into three broad parts:

1. **General laws relating to contract.**
   a. *Formation of contract;*
   b. *Performance of contract;*
   c. *Breach of contract and remedies.*
2. **Laws relating to some particular types of contracts.**
   a. *Contracts of indemnity and guarantee;*
   b. *Contracts of bailment and pledge;*
   c. *Contract of agency.*

So, the first part relating to contract is about how is a contract formed, after a contract is formed the question of performance of that contract arises. Sometimes law excuses certain performances and if not then either the parties will perform their respective contractual obligations or the party who fails to perform accordingly will be held liable for

breach of contract. So the last part relates with the breach of contract and the remedies thereby.

Scope of the Contract Act, 1872:

The Contract Act, 1872, is not exhaustive and where the Act does not cover the case with which the Court has to deal, the Court is bound to follow the principles of the English Common Law, i.e., the rules of justice, equity and conscience.[1] The Contract Act, 1872, does not say anything about the place where the contract is made and it is no part of the ordinary law of contract.[2]

Conflict of laws:

Where the contract is made in one jurisdiction and is to be performed in another jurisdiction or other countries, or is sued upon in a jurisdiction where it was not made or to be performed, it becomes necessary to determine the law of which legal system will govern the contract, or any particular aspect of it. Our Act is silent on this issue.

FORMATION OF A CONTRACT

What is a contract?

It is mentioned in section 2(h) of the Contract Act, 1872, that

'an agreement enforceable by law is a contract'.

This is the simple definition of the term 'contract' given by the Act. So, accordingly it means that whenever the agreement acquires the qualification of enforceability by law then it becomes a contract. In other words, the agreements may be of two types:

---

[1] 56 B 101: 1932 (Bom) 168: 62 (Cal) 612: 39 CWN 461: 1946 (Nag) 114.
[2] 58 C 5931 (Cal) 659.

1. Agreements enforceable by law; and
2. Agreements not enforceable by law.

The agreements which are enforceable by law only those can be the contracts, and never the others which are not enforceable by law. There may be plenty of agreements, some of which are enforceable by law. Suppose, an agreement to purchase 1-kg heroine is not enforceable by law and as such it cannot be a contract, but an agreement for the purchase of a computer is enforceable by law and as such is a contract. In this regard, we can reach to a conclusion that ***all contracts are agreements, but all agreements are not contracts***. Because, to be a contract it must be an agreement first of all, so a contract is necessarily an agreement. But an agreement is not necessarily a contract, suppose the above agreement to purchase heroine is not a contract since it is not enforceable by law. So, all contracts are agreements but all agreements are not contracts. It was observed in *Abdul Gani Sheikh Vs. Jagadish Chandra Mridha and others*[3] that—

> "the alleged agreement between the parties is not a contract as all contracts are agreements, but all agreements are not contracts and such agreement cannot be enforced as it is an illegal agreement and its enforcement would tantamount to sub-lease defeating the clause 10 of the lease deed."

However, in fact, the definition of the term 'contract' given in section 2(h) is not exhaustive one, because it does not give a clear idea about a contract, since the two terms *'agreement'* and *'enforceable by law'* used by the law have not been clarified here. So for a clear idea about a contract we have to depend on at least two other definitions, of **(i)** agreement

---

[3] 2 BLC 121.

and **(ii)** enforceability by law, even in fact this will not suffice, because this attempt will further make us dependent on some other necessary definitions. Let us start the effort with the definition of 'agreement'.

Section 2(e) provides that—

> every promise and every set of promises forming the consideration for each other is an agreement.

By a proper dissection of the definition we get two constituent elements of an agreement:

1. Promise; and
2. Consideration.

It was held in *Bangladesh Muktijoddha Kalyan Trust represented by the Managing Director Vs. Kamal Trading Agency and others*[4] that the consensus ad idem or meeting of minds of the parties is required to constitute an agreement.

Now, what is consideration and what is promise?

What is consideration?

Section 2(d) while defining the term 'consideration' provides that–

> When at the desire of the promisor the promisee or any other person has done or abstained from doing or does or abstains from doing or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise.

---

[4] (1998) 50 DLR (AD) 171.

Analyzing the above definition we get the following ingredients of consideration:

i. It is an act or abstinence. That means it may be positive or negative. It is worth mentioning here that the law uses the word ***'something'*** in connection with the terms, 'act or abstinence' to constitute a consideration. Thus the law does not confine the requirement of such act or abstinence within any particular types or nature, rather makes it open using the term something which means in fact everything.

ii. It is done at the desire of the promisor. So, if it is done at the desire of any third person that will not be a consideration. Conversely, if anything is done at the desire of the promisor, then that will be a good consideration irrespective of the nature of the thing done, even that may be legal or illegal, adequate or inadequate. Thus the key condition here is not the nature of the act or abstinence rather the desire of the promisor.

iii. It may be of three forms, has been done, or is being done or is promised to be done at some future time. Thus consideration may be past, present or future.

What is promise?

Section 2(b) says that 'a proposal when accepted becomes a promise'. If we analyze this definition of 'promise' then we see that to constitute a promise two components are essential:

1. Proposal; and
2. Acceptance.

That means first of all a proposal is necessary and then that must be accepted to have a promise. So, ***now the questions are towards proposal and acceptance***:

What is proposal?

Section 2 (a) says—

> When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.

Here two constituent sectors of an offer are found. *First*, to be an offer there must be a signification of one's willingness to another. *Secondly*, the signification must be made with a definite object that that is intended to have the consent from the person to whom it is addressed. As such, we see that, generally, here no new terminology to be defined has been used by the law and accordingly it can be identified at the starting point of the definition of a contract.

What is acceptance?

After an offer is found there must be an acceptance to reach the stage of *promise*. Section 2 (b) says—

> when the person to whom the proposal is made signifies his assent thereto the proposal is said to be accepted.

Thus the essence of the acceptance is the assent or consent that is coming from the offeree. It simply speaks of giving one's consent to the offer as it is made by the offeror and as such it will be a valid acceptance to convert an offer into a promise.

Since we have got by this time at least a starting point, so now, let us take an effort to summarize the whole chain towards the meaning of contract. Accordingly, a contract is constituted by an agreement and enforceability by law, and an agreement is constituted by promise and consideration, and a promise is constituted by offer and acceptance, and we observed the definition of consideration also. The deficiency of this summary based on the above discussion is that it only analyzed one of the two components of the contract, that is, agreement and kept silence about enforceable by law. In order to analyze the phrase 'enforceable by law', we have to concentrate on section 10 that speaks about the issue, that is, when does an agreement become enforceable by law. Section 10 says—

> All agreements are contracts if they are made by the free consent of parties competent to contract for a lawful consideration and with a lawful object and are not hereby expressly declared to be void.

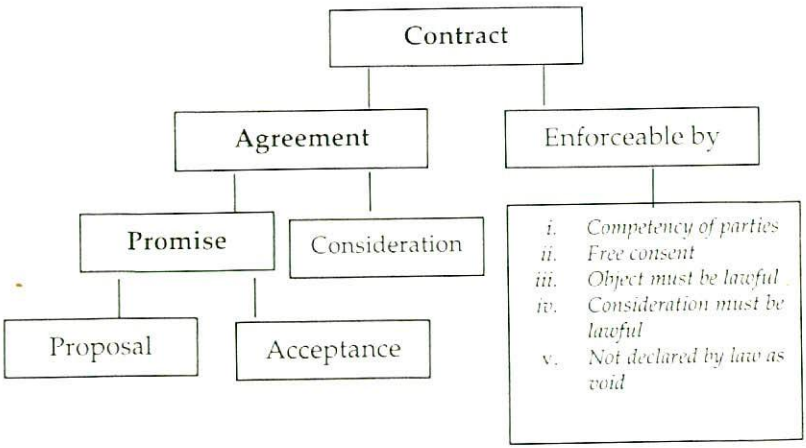
We have seen earlier in the first precise definition of the contract that an agreement enforceable by law is a contract, that means to be a contract an agreement must be enforceable by law. So it can be expressed from another dimension that an agreement which is a contract is, of course, enforceable by law. So, since section 10 of the Act lays down in the agreements which are contracts, this in fact says when does an agreement become enforceable by law, and accordingly we get the answer that to be enforceable by law, i.e., to be a contract, an agreement must fulfill the following conditions:

1. the parties must be competent;
2. the consent of parties must be free;
3. the consideration must be lawful;

4. the object must be lawful; and
5. the agreement must not expressly declared void by law.

So, these five conditions are the further conditions to be satisfied to convert an agreement into a contract. Accordingly, there may be an agreement by the incompetent parties without free consent and it is immaterial whether the consideration or object is lawful or not. Thus, if two persons agree to have a transaction the ultimate object of which is smuggling that will be nevertheless an agreement though that cannot be a contract. Again, if a person of unsound mind enters into a business transaction that may be an agreement though that will not be a contract. But that particular agreement cannot be a contract without satisfying the above conditions.

It would be convenient if the above components are projected through the following diagram:



The above drawn diagram shows the formation of a contract. Each of the above constituent elements of contract will be discussed in detail in the following Chapters. Before starting that elaborate discussion about formation of a contract let us now concentrate on different types of contracts. We can categorize contract from various dimensions and perspectives.

Types of contracts:

It is possible to classify the types of contracts from two perspectives, i.e. as regards the modes of creation and as regards the enforceability and validity.

As regards the mode of creation:

Express and implied contract: In fact, we get the idea to divide contract in these two divisions from section 9 of the Act , which says that in so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

1. *Express contract:* If the offer and acceptance of a contract are made in words, i.e., either expressed orally or in words, the contract will be deemed to be an express one. For instance, A tells 'I would like to sell this car for Tk. 3 Lacs' and B replies 'I agree'—this is an express contract. Thus express contract may be of two types:

    i. *Written contract; and*

    ii. *Oral contract*

2. *Implied contract:* If the offer and acceptance of a contract are made otherwise than in words, it

will be treated as an implied contract. For instance, if a shoe shiner starts polishing the shoes of one person and the later permits it remaining silent knowingly that the first person is doing so to get a payment in exchange of this service, it will be treated by the law as a case of implied contract.

As regards the enforceability and validity:

1. *Valid contract.*
2. *Voidable contract.*
3. *Void contract.*

Valid contract: An agreement enforceable by law is a contract and this is valid contract. In other words, the valid contract is that agreement which fulfils all requirements of a valid contract as imposed by the law. Accordingly, section 10 must be taken into consideration which says directly about the requirements of a valid contract. It has been discussed above elaborately.

Voidable contract: Voidable contract has been defined in section 2 (i) as—

> an agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others.

Thus it appears that the voidability of a contract is a temporary status. It has to be made enforceable by law or has to be set aside and both these are dependent at the option of the parties of one side and not at the option of other side. A contract can become voidable for many reasons if determined by the law. Once a contract becomes

voidable, it acquires a temporary and transitional status. It has to be either validated or annulled. The law gives this power of validating it to the parties of one side of the contract, not of the other side. The law determines at whose option it will be valid in each particular case considering the nature of that voidable contract. Thus a contract cannot remain as voidable forever, rather it has to be valid or void.

3. ***Void contract:*** Section 2(j) says that-

> a contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

Thus the law defines void contract very precisely saying that a contract becomes void by ceasing its enforceability by law. The definition in fact implies two things to be void contract:

i. One valid contract is there.

ii. Then it must cease its enforceability by law

Thus, it does not speak about void *ab initio*. Because, law says that it has to cease its enforceability and it will be void only when it will cease that enforceability. So that for ceasing the enforceability it must acquire it at first and whenever it will have the enforceability by law that implies the presence of a valid contract. Thus, the precondition of a void contract is the existence of a valid contract and afterwards somehow its enforceability will be ceased and then it will be treated as void contract. It can be concluded by saying that a void contract was a valid contract once upon a time and subsequently for some reasons it lost its enforceability in law and then it has become a void contract.

And there may have various grounds for ceasing the enforceability of law, e.g., supervening impossibility or illegality.
Let us now concentrate on certain other terms—

Void agreement: It has been clearly defined by section 2(g) which says—

> an agreement not enforceable by law is said to be void.

Thus an agreement, in fact, will either be enforceable by law or not. If it becomes enforceable by law it will be a contract and if failed to be so then it will remain as agreement and the legal status of that agreement will be 'void agreement'. And there are obviously certain criteria set by law for the enforceability and those criteria have been discussed earlier.

Distinction between void agreement and void contract: There is a similarity between these two terms, void agreement and void contract, that is, both of these are not enforceable by law. The only basic distinction between these two is that a void contract was valid once upon a time, but a void agreement was never in a position to be enforceable by law. In other words, void agreement implies void *ab initio*, i.e., void from very beginning or from its birth, whereas void contract implies that it is not void at its very inception rather it was born as valid or was enforceable by law and subsequently it ceased to be enforceable by law.

Illegal agreement: The concept 'illegal agreement' has not been defined by the Act, but its definition can be inferred from the relevant laws that it means the agreement which is illegal. It is worth mentioning here that all illegal agreements are void but all void agreements are not illegal, because illegality is one of the grounds to be void but there

may be other reasons for which an agreement may be void but in that case that same cannot be termed as illegal. Suppose, entering into an agreement to write 100 standard pages within five minutes in one's own handwriting is void agreement, but this is not an illegal agreement. But, if some how an agreement becomes illegal then obviously that will be void agreement.

Illegal contract: This is a misnoma, because it creates a paradoxical situation. A contract implies that it is enforceable by law. So, whenever the term 'contract' is used it cannot bear the term 'illegal' with it, because that will create self contradiction which will give rise to a paradox. Because the agreement which is enforceable by law cannot be termed as illegal. That is why, illegal agreement is a correct term but not the illegal contract.

Unenforceable contract: This is another interesting terminology which has not been defined in the Contract Act, 1872. It means a contract which cannot be enforced by the courts of law for some technical reasons. Suppose, the right arising out of a time barred contract may not be enforceable in the courts of law and such a contract may be termed as unenforceable contract.

CHAPTER 2

PROPOSAL AND ACCEPTANCE

Definition of 'Proposal':

Proposal is the starting point from where an agreement gets life formally which ultimately may take the shape of a legally binding contract. The term 'proposal' which is used in Bangladesh is synonymous with the term 'offer' used under English law. Section 2(a) of the Contract Act, 1872, while defining the term 'proposal' says that—

> Where one person signifies to another his willingness to do or to abstain from doing something with a view to obtaining the assent of that other to such act or abstinence he is said to make a proposal.

If we dissect the above mentioned definition then one may find out the following elements of a proposal:

1) Signification of one's willingness;
2) Willingness is expressed to another person;
3) The willingness may be affirmative or negative, i.e., either to do something or to abstain from doing;
4) The said willingness is expressed to other person with a definite object, that is, the person who makes

it intends to obtain the consent to the same from the person to whom it is made.

Analysis of the definition:

What is an offer? The simplest answer to this question is that it is a willingness of one person. But if someone has a willingness in his mind it will not be sufficient to constitute an offer, rather it must be expressed to someone else. So if someone alone being in a closed sound proof room utters the words 'I would like to sell my car for Tk. 3 lacs'—it will not be an offer, the foremost reason is that it is not expressed to another person. Now, what will be type of that willingness? Of course, that willingness may be to do something or to abstain from doing something. The last important element of an offer is relating to the intention of the person who is making the proposal i.e. proposer, that is one must make it with the intention of getting the consent from the other person to whom it is made. Let us examine the following conversation:

(A conversation is taking place between A and B while they are taking tea at fine evening of autumn sitting in the garden of B.)

A: Have you bought another car? I just heard it from C that you purchased a ***lexus*** *car yesterday.*

B : Yeah. It's true.

A : But I think the second car will be really useless for you, one is sufficient.

B : I am thinking to sell my old one.

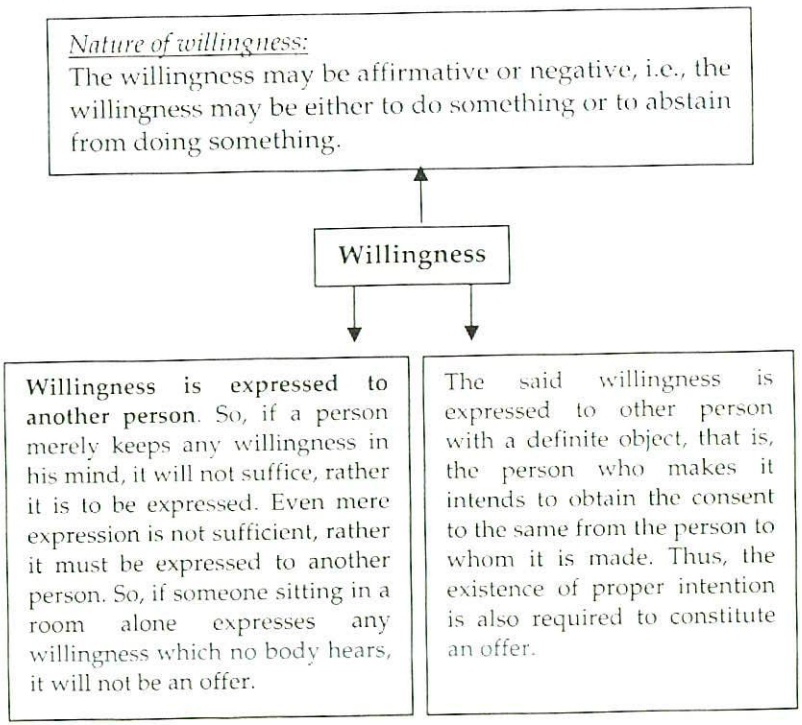
A : For how much?

B : 5 lacs.

A: That's nice.

Here the statements made by B failed to constitute an offer because of at least two reasons—first of all, he was not serious about his willingness, so it's not the final expression of his willingness, rather he was merely thinking like this. Secondly, here B told that he was thinking to sell the car for a certain price but it was not intended by his statement that he made it with a view to obtain the consent from A in this regard. How will it be understood that it is intended as such? The simple answer is it will be inferred from the construction of the offer and the circumstances.

Thus according to the definition given by the Act the centre point of an offer is 'willingness', and the sum total of the answers to certain questions around the term 'willingness' constitutes an offer.


Nature of willingness:
The willingness may be affirmative or negative, i.e., the willingness may be either to do something or to abstain from doing something.
Willingness
Willingness is expressed to another person. So, if a person merely keeps any willingness in his mind, it will not suffice, rather it is to be expressed. Even mere expression is not sufficient, rather it must be expressed to another person. So, if someone sitting in a room alone expresses any willingness which no body hears, it will not be an offer.
The said willingness is expressed to other person with a definite object, that is, the person who makes it intends to obtain the consent to the same from the person to whom it is made. Thus, the existence of proper intention is also required to constitute an offer.

Characteristics of a proposal and some rules regarding a valid proposal:

1. The proposer must intend to create legal relations and as such expressed willingness (which in turn is going to be an offer) must be capable of creating legal relations. We can discuss an English case in this regard to make the concept clear:

Balfour Vs. Balfour [1919], 2 K.B. 571 CA

> 'A, a businessman residing in Ceylon, promised B, his wife, who was living in England for reasons of health, to pay her a monthly allowance. It was promised also that the allowance will be continued till her come back to Ceylon. The dispute arose when A denied subsequently to give her the promised allowance. It was held that B could not enforce the obligation, as from the nature of the agreement it appeared that no intention existed to give rise to a legal obligation and as such even there was no offer at all to be accepted and consequently there was no contract between A and B in respect of paying the said allowance.'[1]

Similarly an invitation to dine is not an offer. So, if someone invites his friends to have a tea in his house and if any of the invited guests after accepting the said invitation misses that tea party, that person will not be held liable for breach of contract, though the host has already incurred certain expenses in the preparation of the party, because, these are purely social relations, where legal obligations and consequences are never intended, so there was no offer – no acceptance – no contract – no breach of contract. It is presumed ordinarily that the business expressions are

[1] Balfour Vs. Balfour, 1919, 2 K.B. 571.

intended to create legal relations, but there may be some cases where even business expressions may not intend to create legal relations, of course that will depend on the construction of the offer and the relevant circumstances.

2. Mere expression of intention is not sufficient to constitute an offer, rather that must be the final decision of his thought which is made with a definite purpose, i.e., to obtain the consent of the person to whom it is made. Thus if A says to B, 'I may sell one of my cars if I can get Tk. 3 lacs'—this is not an offer; but if A says to B, 'I will sell you my latest car for Tk. 3 lacs'—it is an offer. Again, if someone makes any statement regarding his any intention during a conversation, of course that will not suffice to constitute an offer, even though the person to whom such intention is expressed acts accordingly, there will be no offer, so no question of acceptance and as such of any contract. For example: A told B, while taking tea, I will be happy if I can sell my house situated at Uttara for Tk. 1 crore to a university teacher, B being a university teacher comes forward with the said money and claims the house. B's such performance will not amount to acceptance, because A's statement did not constitute any offer, since it was a mere statement of intention expressed to B out of a conversation.

3. An offer must be definite i.e. any vague or ambiguous statement is incapable to give birth to a proposal. The terms and conditions also must be definite or capable to be made definite. So, if a person indicating two cars of the same model kept in front of him and tells that 'I will sell one car for Tk. 3 lacs and another for Tk. 2 lacs'—we have not an offer due to the ambiguity and uncertainty in the statement made. But if though the statement is not definite at the moment directly but is capable to be made

definite applying the common sense and general idea then that statement may constitute an offer. For example, one *Lexus* car of new model and another scooter are kept in one place and indicating these the owner says 'I will sell these two, one for Tk. 1 lac and another for Tk. 30 lacs'—we may have an offer, because it is capable to be made definite by applying the common idea that a scooter is not supposed to be sold for Tk. 30 lacs. We can refer the following case to make our idea clear:

> ***Montreal Gas Co. Vs. Vasey, 1900, A.C. 595***
>
> There was a contract between A and B where, *inter alia*, A promised that if he was satisfied with him as a customer he would favorably consider an application for renewal of the contract. It was held that there was nothing in these words which would create a legal obligation, as the promise was a vague one since there is no criterion to determine the satisfaction as customer.'[1]

4. An offer may be made to a specific person or specific class of persons or even to the world at large generally.[2] Because the definition of the term 'proposal' does not restrict that the offer should be made only to one person rather the law says 'when one person signifies to ***another***...' which implies that the offer must not be addressed to the offeror himself, rather 'to another'—so it is not a bar in making an offer even to the whole world at large. Anson rightly observed: 'an offer need not be made to an ascertained person, but no contract can arise until it has been accepted by an ascertained person.'[3]

---

[1] Montreal Gas Co. Vs. Vasey, 1900, A.C. 595.

[2] Carlill Vs. Carbolic Smoke Ball Co., 1892, 2 QB 484, is a famous English Law case on this particular point.

[3] Anson's Law of Contract, 409 23rd ed. by A.G. Guest, (1971).

Examples:

a) A says B to sell his computer to him for a certain price—it is a specific proposal made to one specific person, B , which is capable to be accepted only by B alone, and no other person except B can accept the offer.

b) A makes an offer to sell some computers at low price and specifically mentions in the offer that it is made only for the law students—it is an offer made to a specific class of persons.

c) A promises to give a reward of Tk. 1000 through an advertisement published in his own website to anyone who can create a new software relating to *e-case reference*—it is a general offer made to the whole world at large which is capable of being accepted by any person of the world.

5. Offer may be expressed or implied. If it is made by words, written or oral, it becomes an express offer and if it is made otherwise than in words, i.e., by conduct—it is an implied one. Because the definition of offer says 'when one person signifies to another....'—here the mode of signification is not mentioned, so it can be made in whatever mode, either express or implied, since the only important thing to be considered is whether the willingness is signified to another person or not.

Examples:

(a) A tells B 'I will sell my car to you for Tk. 1000'—it is an express offer which was made orally.

(b) A sends an e-mail to B offering to sell his land situated at Gulshan for a certain price—it is also an express offer which is in the form of writing.

(c) A professional shoe shiner when starts polishing one's shoes in front of the owner of the shoes, and the owner does not deny. That is a case of implied offer which is made by conduct.

6. Since one's willingness may be positive or negative, an offer also may be positive or negative, because an offer is nothing but the expression of one's willingness. Again, the definition of 'proposal' provides that '... ... ..., his willingness to do or to abstain from doing something ... ... '—here it expressly includes the positive (*to do*) willingness and negative (*to abstain from doing*) willingness and as such it in fact speaks of positive and negative offer.

Example:

(a) A tells that 'I will sell my car for Tk. 3 lacs'—it is a positive offer.

(b) A tells B that 'If you do not go Cox's Bazar tomorrow, I will not give C Tk. 3 lacs'—it is a negative offer.

7. Offer may be conditional or unconditional. It is natural that besides unconditional offers one can make a proposal subject to certain stipulations also. For example, if A tells B that 'I will sell my car to you if you recruit my nephew in your company as a manager'—it is a conditional offer. In case of a conditional offer the offeree must fulfill all terms and conditions of offer in order to accept it.

8. It is true that an offer is an expression of one's willingness but if that willingness is expressed in the form of a mere answer in reply to an inquiry in that regard that will not constitute a definite offer. There must be a clear intention of entering into a binding contract and for that purpose the said offer must be addressed to the offeree with the intention of taking the consent to the same from the person to whom it is made. Negotiations for the sale of land may involve the adjustments of so many questions of detail that the courts will require cogent evidence of an intention to be bound before they will find the existence of an offer capable of acceptance.[1] Thus in *Harvey Vs. Facey*[2] :

> The plaintiffs telegraphed to the defendants, 'Will you sell us Bumper Hall Pen? Telegraph lowest cash price.' The defendants telegraphed in reply, 'Lowest price for Bumper Hall Pen, $900.' The plaintiffs then telegraphed, 'We agree to buy Bumper Hall Pen for $900 asked by you. Please send us your title-deeds.' The rest were silence. It was held by the Judicial Committee of Privy Council that there was no contract. The second telegram was not an offer, but only an indication of minimum price if the defendants ultimately resolved to sell, and the third telegram was therefore not an acceptance.

9. Communication is another key feature and also an essential constituent element of an offer, since there can not be any offer without it's being communicated to another person. There is an independent section in the Contract Act, 1872, dealing with the communication of offer, but the basic condition of it's being present in an offer, in fact, is mentioned in the definition of proposal

---

[1] Cheshire and Fifoot, *Law of Contract*, p.31.
[2] (1893) AC 552.

itself, since the definition says that 'when one person signifies to another...'—this signification in fact indicates the communication of offer that it is to be signified i.e. it has to be communicated to the other person. So, if a person makes a statement with a view to have an offer through it and nobody listens or knows it then in spite of satisfying all conditions and having all other constituent elements of an offer it will not be an offer for the absence of communication or signification as required by the law.

Offer and Invitation to Treat:

Offers must be distinguished from invitation to treat, because there are many statements which seem to be offers, but, in fact, these are invitation to treat. Simply speaking, we discussed earlier the constituent elements of an offer, and if any statement lacks any of those elements that may be termed as an invitation to treat. In fact, the Contract Act, 1872, does not define this term and even nowhere in this Act this term has been used. But it has become the popular subject to judicial pronouncements, because a lot of problems have arisen by this time centering one specific question that whether a particular incident is an offer or invitation to treat. Because, on this basic answer the whole agreement becomes dependent because if there is no offer then there can not arise any agreement at subsequent time since the offer is the first formal step towards the formation of a contract. Sometimes the distinction between these is quite obvious and sometimes it is really a tricky one and frequently confusion arises regarding this question to determine whether a particular incident (statement or act) is an offer or a mere invitation to treat.

It is the usual practice in business that a transaction begins with negotiations and so many statements and acts take place at this stage of negotiation which usually are not offers but invitations to treat. A number of invitations to treat may be present in one business transaction whereas at the end of negotiation a definite offer will come out which are capable of being accepted. The offeror must have completed his share in the formation of a contract by finally declaring his readiness to undertake an obligation upon certain conditions, leaving the offeree the option of acceptance or refusal and he must not merely have been feeling his way towards an agreement, not merely initiating negotiations from which an agreement might or might not in time result, rather he must be prepared to implement his promise, if such is the wish of the other party.[1]

It will be convenient to distinguish between an offer and an invitation to treat on the basis of two factors:

1. Nature of the statement; and
2. Intention of the party who is making the statement.

In the context of the nature of the statement it is to be examined whether the said statement satisfies all requirements of a valid offer, *inter alia,* final expression of one's willingness and sufficiently definite to be capable of acceptance, if the statement or conduct becomes so satisfactory then it will be an offer, but if it is in short of it at any degree then it will be an invitation to treat, not an offer. In this regard the case of *Gibson Vs. Manchester City Council*[2] is remarkable here:

---

[1] Cheshire and Fifoot, *Law of Contract*, 2nd ed., p.27.
[2] 1979, 1 All ER 972; 1979, 1 WLR 294.

> "In September 1970 the council adopted a policy of selling council houses to council tenants. On 16 February 1971 the City Treasurer wrote a letter to Mr. Gibson stating that the council 'may be prepared to sell the house to you at the purchase price of £2,725 less 20% = £2,180 (freehold)'. The letter invited Mr. Gibson to make a formal application which he did. In the normal course, this would probably have been followed by the preparation and exchange of contracts but before that process had been concluded, control of the council changed hands as a result of the local government elections of May 1971. The policy of selling council houses was reversed and the council decided only to complete those transactions where exchange of contract had taken place. Mr. Gibson claimed that a binding contract had come into existence but the House of Lords held that the Treasurer's letter of 16 February was at most an invitation to treat and that therefore Mr. Gibson's application was an offer and not an acceptance."[3]

Then in the context of intention it is to be judged whether the person who made the statement made it with the object of getting the consent from the person to whom it was made. In other words, here the intention of the party making it must be discovered and if it is found that the statement was made with a view to obtaining the assent of that other to such act or abstinence then it will be an offer; but if it lacks this issue then in spite of satisfying all other requirements to be a valid offer, it will be an invitation to treat. So, what we see in practice, a 'TO-LET' board is not an offer for various reasons, *inter alia*, it is not the intention of the party who is hanging or publishing a 'TO-LET' board to obtain the consent from the other party, rather it is made merely to attract the prospective customers or tenants and to

[3] This case summary has been taken from Cheshire and Fifoot, *Law of Contract*, 2nd ed., p.32.

invite the interested parties to come for negotiation. In fact, such a 'TO-LET' board is not usually a ready statement to be capable to constitute an offer, rather there may be so many issues yet to be settled.

It has been the subject of judicial debate for many years and the distinction will be clear if we examine certain cases. The question to determine the distinction between an offer and an invitation to treat arose first in the law of auctions.[1] Let us now concentrate on some specific issues relating to offer and invitation to treat and in doing so it will be a better effort if some English law cases are referred here, since there are a lot of English law cases on this particular point which will definitely make the study on the distinction between an offer and invitation to treat easier resulting to some effective conclusions.

Auction sales:

It is well established principle regarding auction sale that an offer is made by the bidder, i.e., the bid itself is an offer which is to be accepted by the fall of the hammer of the auctioneer on his table.[2] There are certain issues relating to auction sales.

The first issue is about the request for bids. Is the request for bid a definite offer? The issue was held negatively in *Payne Vs. Cave.*[3]

The second issue is about the nature of advertisement of an auction sale—is it an offer or invitation to treat? The advertisement of an auction is generally held to be an invitation to treat.[4] Next question arises 'does an

---

[1] Cheshire and Fifoot, *Law of Contract*, p.27., 2nd ed.
[2] British Car Auctions Ltd. Vs. Wright, 1972, 1 WLR 1519.
[3] 1789, 3 term Rep 148.
[4] Harris Vs. Nickerson, 1873, LR 8 QB 286.

advertisement that specified goods will be sold by auction on a certain day constitute a promise to potential bidders that the sale will actually be held?' In *Harris Vs. Nickerson*[5] this question was answered negatively, where the plaintiff failed to recover damages for loss suffered in travelling to the advertised place of an auction sale which was postponed ultimately before the time fixed for the sale to be held.

The third issue is regarding the advertisement that mentions the sale to be held without reserve—is it a definite offer to sell to the highest bidder? In *Fenwick Vs. Macdonald, Fraser & Co.*[6] the Scottish court decided it negatively holding that no agreement is complete unless the auctioneer acknowledges the acceptance of the bid by the fall of his hammer. But in English case *Warlow Vs. Harrison*[7] it was the subject of obiter dicta where the court opined that the addition to the advertisement of the two words 'without reserve' converts it into an offer that the sale will in fact be subject to no reserve price and that the offer is accepted by the highest bidder at the auction sale. This *dicta* has been followed in a recent English case in 2000 in *Barry Vs. Davies (Trading as Heathcote Ball & Co)* [8].

Tenders:

The general rule is that an invitation to tender for a particular project is an invitation to treat and the person who submits the tender is deemed by law as an offeror as the submission of tender is an offer which in turn is to be accepted by the person who invites the tender for any particular project. Thus the mere fact that a person made a

---

[5] *Ibid.*

[6] 1904, 6 F (Ctof Sess) 850.

[7] 1859, 1 E & E 309.

[8] 1 WLR 1962, Court of Appeal.

certain quotation in response to the tender notice, even granting that it was the lowest quotation, will not, in any manner create an obligation to accept it on the person who issued the tender notice.[1]

But in the following two recent cases in England different approach of the court is found regarding the legal position of tenders, where in fact an invitation to tender has been treated as an offer capable of creating contractual obligations under certain circumstances. The cases are:

- **Harvela Investments Ltd. Vs. Royal Trust Company of Canada (CI) Ltd[2].**

  The first defendants owned a block of shares in a company. The plaintiff (Harvela) and the second defendant (Sir Leonard Outerbridge) were rival bidders for the shares. The reason for their interest in the shares was that the ownership of the shares would give the successful bidder effective control of the company. The first defendants sent out an invitation to both Harvela and Sir Leonard in which they invited both parties to submit 'any revised offer which you may wish by sealed tender or confidential telex' to the first defendants' solicitors. The first defendants in turn stated that 'we confirm that if any offer made by you is the highest offer received by us we bind ourselves to accept such offer provided that such offer complies with the terms of this telex'. Harvela submitted a bid of $2,175,000, while Sir

[1] PLD 1983 Karachi 340 (DB).
[2] (1986) AC 207.

> Leonard submitted a bid of $2,100,000 'or [Canadian] $101,000 in excess of any offer which you may receive which is expressed as a fixed monetary amount, whichever is the higher'. The first defendants accepted Sir Leonard's offer, treating it as a bid of $2,276,000 and entered into a contract with the second defendant for the sale of the shares. Harvela issued proceedings against both the first defendants and Sir Leonard in which, among other things, it challenged the validity of Sir Leonard's bid. The House of Lords held that Sir Leonard's bid was indeed invalid and that *the first defendant was contractually bound to transfer the shares to Harvela in accordance with the terms of its bid*.[3]

Thus it appears from the above case that the invitation to tender has been treated by the court ultimately as an offer which was made accompanying the declaration of assurance regarding the acceptance of the highest bid. *Lord Templeman* observed:

> The invitation required Sir Leonard to name his price and required Harvela to name its price and bound the vendors to accept the higher price. The invitation was not difficult to understand and the result was bound to be certain and to accord with the presumed intentions of the vendors discernible from the express provisions of the invitation. Harvela named the price of $2,175,000; Sir Leonard failed to name any price except $2,100,000 which was less than

---

[3] This case summary is taken from Mackendrick, Ewan, *Contract Law: Text, Cases and Materials*, 1st edition, 2003, Oxford University Press, UK, p. 82.

> the price named by Harvela. *The vendors were bound to accept Harvela's offer*[1].

The legal nature of the invitation to tender sent by the first defendant in the above case has been explained by *Lord Diplock* in the following words:

> A unilateral or 'if' contract, or rather of two unilateral contracts in identical terms to one of which the vendors and Harvela were the parties as promisor and promisee respectively, while to the other the vendors were promisors and Sir Leonard was promisee. Such unilateral contracts were made at the time when the invitation was received by the promisee to whom it was addressed by the vendors; under neither of them did the promisee, Harvela and Sir Leonard respectively, assume any legal obligation to anyone to do or to refrain from doing anything[2].

The following analysis of *Ewan Mckendrick*[3] regarding this case is worth mentioning here:

> 'The first defendants did, however, assume a legal obligation to Harvela and Sir Leonard under these two contracts. It assumed an obligation to enter into a contract to sell shares to the promisee who submitted the highest bid in accordance with the terms of the invitation. In this way unilateral contract concluded with the successful bidder would be transformed into a binding bilateral contract, while the unilateral contract with the

---

[1] Harvela Investments Ltd. Vs. Royal Trust Company of Canada (CI) Ltd. (1986) AC 207, at p. 230.
[2] *Ibid*, at p. 224.
[3] Mackendrick, Ewan, *'Contract Law: Text, Cases and Materials'*, 1st edition, 2003, Oxford University Press, UK, p. 83.

> unsuccessful bidder would be terminated by the submission of the higher bid.'

- **Blackpool and Fylde Aero Club Ltd. Vs. Blackpool Borough Council**[4]

In the above case the Court adopted a 'two-contract analysis' which has been summarized by *Ewan Mckendrick*[5] in the following words:

> The claimants' bid was not considered by the Council because they considered it to be a late submission and concession was awarded to another party. The claimants brought an action for damages, *inter alia*, for breach of contract. The obvious difficulty which they faced was that they did not appear to be in a contractual relationship with the defendants because an invitation to tender is only an invitation to treat. The claimants had therefore simply submitted an offer which the defendant had not accepted. But the Court of Appeal took a different approach. They held that the defendants were contractually obliged to consider the claimants' tender and, for breach of that obligation, they were liable for damages. The court appeared to adopt a two-contract analysis. A contract was concluded with the party whose tender was accepted but the invitation to tender also constituted a unilateral offer to 'consider' any conforming tender which was submitted and that offer was accepted by any party who submitted such a tender.

Display of goods:

Now-a-days, fixed price shops are increasing and being popular day by day. The issue is whether the display of

[4] (1990) 1WLR 1195, Court of Appeal.

[5] Mckendrick, Ewan, *'Contract Law'*, 4th ed., 2000, Palgrave, p.39.

goods for sale is an offer or invitation to treat. If goods are exhibited in a shop-window or inside a shop with a price attached, does this constitute an offer to sell at that price?[1] The general English Law view is in favor of it's being treated as an invitation to treat. *Lord Parker* in *Fisher Vs. Bell*[2] undoubtedly decided the issue suggesting that:

> it is clear that, according to the ordinary law of contract, the display of an article with a price on it in a shop window is merely an invitation to treat. It is in no sense an offer for sale, the acceptance of which constitutes a contract.

In *Timothy Vs. Simpson*[3] it was suggested by the counsel that 'if a man advertises goods at a certain price, I have a right to go into his shop and demand the article at the price marked', and the learned judge Park B emphatically replied that 'No; if you do, he has a right to turn you out'. In fact this view was confirmed in a subsequent case after 118 years in 1952 in *Pharmaceutical Society of Great Britain Vs. Boots Cash Chemists (Southern) Ltd.*[4]

> The defendants adapted one of their shops to a 'self-service' system. A customer, on entering, was given a basket and, having selected from the shelves the articles he required, put them in the basket and took them to the cash desk. Near the desk was a registered pharmacist who was authorized, if necessary, to stop a customer from removing any drug from the shop.

The basic question was regarding the time that when did the sale take place and that was dependent on another primary

---

[1] Cheshire and Fifoot, *Law of Contract*, 2nd ed., p.29.
[2] 1961, 1 QB 394 at 399; 1960, 3 All ER 731 at 733.
[3] 1834, 6 C & P 499 at 500.
[4] 1952, 2 QB 795; 1952, 2 All ER 456, affd (1953) 1 QB 401, (1953) 1 All ER 482.

question: does display of goods with the price tags attached with it amount to an offer or invitation to treat? The plaintiff claimed that such display was an offer and it was accepted when the said drug is put into basket and the contract has become complete, whereas the contention of the defendant was that the display was a mere invitation to treat and so that by putting the drug into the basket at best he made an offer which the company is at absolute liberty to accept or refuse. *Lord Goddad*, at first instance, decided that the display of goods is only an invitation to treat though it bears a price tag with it and the status will remain same even though the shop concerned becomes a self service shopping mall. The Court of Appeal upheld the decision accepting the following reasoning made by *Lord Goddad*[5]:

> The transaction is in no way different from the normal transaction in a shop in which there is no self-service scheme. I am quite satisfied it would be wrong to say that the shopkeeper is making an offer to sell every article in the shop to any person who might come in and that that person can insist on buying any article by saying 'I accept your offer'. I agree with the illustration put forward during the case of a person who might go into a shop where books are displayed. In most book-shops customers are invited to go in and pick up books and look at them even if they do not actually buy them. There is no contract by the shopkeeper to sell until the customer has taken the book to the shopkeeper or his assistant and said 'I want to buy this book' and the shopkeeper says 'Yes'. That would not prevent the shopkeeper, seeing the book picked up, saying: 'I am sorry I can not let you have that book, it is the only copy I have got and I have already promised it to another customer'. Therefore, in my opinion, the mere fact that a customer picks up a bottle of medicine from the

[5] *Ibid.*

> shelves in this does not amount to an acceptance of an offer to sell. It is an offer by the customer to buy, and there is no sale effected until the buyer's offer to buy is accepted by the acceptance of the price.
>
> It is well established principle that the mere exposure of goods for sale by a shopkeeper indicates to the public that he is willing to treat but does not amount to an offer to sell. That principle is not completely reversed merely because there is a self service scheme in operation... ... ... it comes to no more than that the customer is informed that he may himself pick up article and bring it to the shopkeeper with a view to buying it and if, but only if, the shopkeeper then expresses his willingness to sell, the contract for sale is completed. In fact, the offer is an offer to buy, and there is no offer to sell; the customer brings the goods to the shopkeeper to see whether he will sell or not. In 99 cases of a 100 he will sell and, so he accepts the customer's offer, but he need not do so.

So it is the well established rule that the display of goods is not an offer, but it is criticized on the ground that it creates hardship on the buyers. There is an English authority where display of goods in a self-service store was held an offer.[1] It was held in another case[2] that the display of deck chairs for hire on a beach was an offer which was accepted by a customer taking a chair from the stack.

Advertisements:

The general principle relating to advertisement is that it is not an offer, but an invitation to treat. It is also an established principle that a circular, catalogue advertising goods for sale is not an offer itself, but it is a mere attempt to

---

[1] Lasky Vs. Economy Grocery Stores, 319 Mass 224,65 NE 2d 305, 1946.

[2] Chapleton Vs. Barry UDC (1940) 1 KB 532.

induce offers[3] and in this regard *Lord Herschell's* observation is worth mentioning here :

> The transmission of such a price-list does not amount to an offer to supply an unlimited quantity of the wine described at the price named, so that as soon as an order is given, there is binding contract to supply that quantity. If it were so, the merchant might find himself involved in any number of contractual obligations to supply wine of a particular description which he would be quite unable to carry out, his stock of wine of that description being necessarily limited.[4]

But it does not necessarily mean that an advertisement can never be an offer; of course there are certain instances where even an advertisement may constitute an offer and *Carlill Vs. Carbolic Smoke Ball Company*[5] is one of those instances where an advertisement was held to be an offer.

> The defendants who were the proprietors of a medical preparation called 'The Carbolic Smoke Ball", issued an advertisement in which they offered to pay $100 to any person who succumbed to influenza after having used one of their smoke balls in a specified manner and for a specified period. They added that they had deposited a sum of $1000 with their bankers 'to show their sincerity'. The plaintiff, on the faith of the advertisement, bought and used the ball as prescribed, but succeeded in catching influenza. She sued for the $100.
>
> One of the issues in the above case was whether the advertisement was an offer or invitation to treat and it was held that the said advertisement was a definite offer made to the world at large.

---

[3] CF Spencer Vs. Arding , 1870, LR 5 CP 561.
[4] Grainger & Son Vs. Gough (1896) AC 325 at 334.
[5] 1892, 2 QB 484, affd 1893, 1 QB 256.

Bowen LJ referring the advertisement in the *Carlill* case observed that: 'It is not like cases in which you offer to negotiate, or you issue advertisements that you have got a stock of books to sell, or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate—offers to receive offers—offers to chaffer.' As such we see that the advertisement in the *Carlill* case was differentiated from ordinary other advertisements and this particular advertisement is given the status of a valid offer as one of the exceptions to the general principle that the advertisements are not offers but invitations to treat. Why has it been considered as an offer? May be that is due to the reasons, *inter alia*, that the advertisement was clear and definite enough to constitute an offer and that it was inferred from the wording used in the advertisement that it was intended to create legal obligation treating as an offer to be capable of acceptance and that their deposit in the bank have shown their sincerity that they are really ready to create some legal obligations and mere inspiration is not the motto rather it was made with sufficient precision and seriousness to be capable of acceptance by the prospective customers following the instructions, terms and conditions given in the said advertisement.

Timetables and boarding on bus or train

The matters of daily life are in most of the cases become confusing. Such as in case of boarding on a bus or train there may be four probable explanations[1]:

1) The bus time-table and the running of the bus are an offer by the bus company which is accepted

[1] Mckendrick, Ewan, *Contract Law*, 4th ed., 2000, Palgrave, p.41.

by boarding on the bus. This was the view of *Lord Greene* expressed in *Wilkie Vs. London Transport Board*[2] where he says in the *obiter dicta* that the offer was made by the bus company and it was accepted when a passenger 'puts himself either on the platform or inside the bus'.

2) Alternatively an acceptance takes place when the passenger asks for a ticket and pays the fare.

3) The bus time-table is an invitation to treat, the offer is made by the passenger on boarding the bus and the acceptance takes place when the bus conductor accepts the money and issues the ticket.

4) The bus conductor makes the offer when he issues the ticket and this offer is accepted by paying the fare and retaining the ticket.

Which particular view is correct? There is no case law in Bangladesh regarding this issue. English authority in *Wilkie*[3] case has been also criticized by the academicians, e.g., in the book *'Law of Contract'* written by *Cheshire and Fifoot* (at page 31) this opinion has been criticized as such that 'if it represents the law it would seem that the corporation makes an offer of carriage by running the bus and that the passenger accepts the offer when he gets properly on board; and the contract would then be complete even if no fare is yet paid or ticket given.' However, does this debate have any practical utility or only of academic interest? This issue

---

[2] (1947) 1 All ER 258.
[3] *Ibid.*

has been answered by *Ewan Mckendrick*[1] in the following words:

> 'In many ways the issue may seem to be an academic one, devoid of any practical consequence. But this is not the case. It has serious consequences if there is an exclusion clause contained on the back of the ticket. If the first analysis is adopted then the exclusion clause is not part of the contract because the contract is concluded before the ticket is handed over. On the other hand if the final alternative is adopted then the exclusion clause is part of the contract because it is contained in the offer made by the conductor. A court might adopt the first of these alternatives in our exclusion clause example in order to protect the passenger but, would it also apply it where the same passenger boards the bus by mistake and wishes to get off the bus before it moves from the stop without paying for his fare? As *Professor Trietel* has stated (1999), the cases 'yield no single rule' and all that can be said 'the exact time of contracting depends in each case on the wording of the relevant document and on the circumstances in which it was issued'.'

Communication of offer

Communication plays the key role in the ultimate formation of one event, because without communication both the offer and acceptance become meaningless. Communication of offer is the prior condition of its acceptance. When does the communication of offer become complete? Section 4 of the Contract Act, 1872, specifically deals with this issue and says that—

> (the communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.)

---

[1] Mckendrick, Ewan. *Contract Law*. 4th ed., 2000. Palgrave. p.41.

What is acceptance?

Section 2(b) of the Contract Act, 1872, states that—

> when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted.

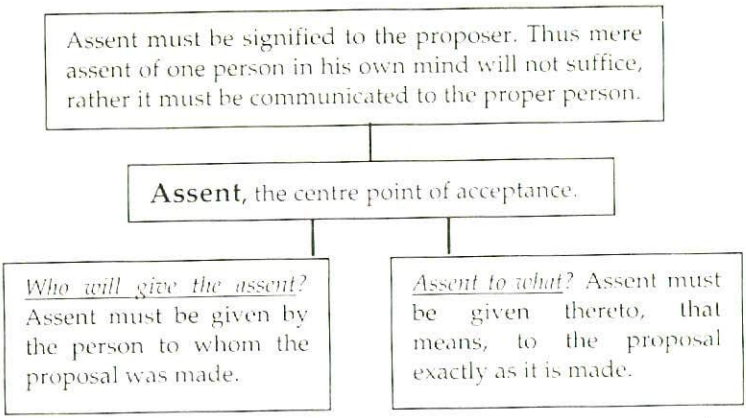
We can dissect the definition at least into three constituent parts:

1. Signification of the assent;
2. Assent is signified by the person to whom the proposal was made;
3. The term 'thereto' used in this section implies that the assent must be given to the offer as it is.

By an analysis of the above definition we can reach to the following conclusions:

1. A proposal must be accepted by the person to whom the offer is made. So, if A offers B to sell his car to him, C cannot accept the offer.
2. If the consent is not signified then there will not be a valid acceptance. It implies that if someone keeps the assent in his own mind then it will not be enough to constitute an acceptance. So, that assent must be signified.
3. The term 'thereto' in fact indicates to some essential conditions of acceptance. The law specifically used the term for an assent to be given towards 'thereto', i.e., to the exact incident which is considered as an offer. It implies that nothing can be excluded from the offer or nothing can even be added with the offer. So, if someone would like to sell his car for a certain price and the person to whom it is addressed he accepts the offer

adding another condition that it must be painted before the delivery of possession—it is not a signification of his assent 'thereto', i.e., to the offer as it is and so is not an acceptance in the eye of law. The consequence will be the same if something is excluded from the offer at the time of acceptance by the other party to whom the offer was made.


Assent must be signified to the proposer. Thus mere assent of one person in his own mind will not suffice, rather it must be communicated to the proper person.
Assent, the centre point of acceptance.
Who will give the assent? Assent must be given by the person to whom the proposal was made.
Assent to what? Assent must be given thereto, that means, to the proposal exactly as it is made.

Rules regarding a valid acceptance : nature and mode of acceptance

What will be the nature of a valid acceptance?

Section 7 of the Act deals with the basic rules regarding a valid acceptance. It says—

> (In order to convert a proposal into a promise the acceptance must be absolute and unqualified)

Accordingly about the nature of a valid acceptance the law imposes two requirements to be fulfilled i.e. the acceptance must be—

i. Absolute; and

ii. Unqualified.

So, acceptance with a variation is no acceptance at all. In fact, the indication to these basic points is found in the definition of acceptance itself where the term 'thereto' has been used to mean that the consent must be given to the offer exactly as it is made by the offeror. However, just to make it more clear and to give emphasis it has been elaborately mentioned in section 7 that *in order to convert a proposal into a promise* that means the acceptance to be an effective one it *must be absolute and unqualified*. 'Absolute' and 'unqualified' these two terms together make one thing emphatically clear that acceptance must be made to the offer as it is made without any variation in it. In other words, nothing can be added with the offer or nothing can be excluded and no part or no term of offer can be varied to any extent in its acceptance. Few examples can help us to understand the discussion clearly.

Example 1

A : I will sell my car to you for Tk. 3 lacs.
B : I agree. But you must paint the car before giving it to me.

Here B's statement is not an acceptance, because it adds one more condition which did not exist in the offer. Thus, it is not an unqualified acceptance as required by law.

Example 2

A: I will sell two cars together for Tk. 5 lacs.
B: I agree to purchase any one of it for Tk. 2.5 lacs.

Here B's statement does not constitute a valid acceptance. Because it is not absolute one as required by law. It excluded something from the original offer and agreed partially, so it is not a valid acceptance.

Example 3

A: I will sell my computer to you for Tk. 50 thousands only.
B: I agree to accept for Tk. 49 thousands.

Here also B's statement is not a valid acceptance, because it is a statement with a variation and deviation from the offer.

Manner of acceptance:

Section 7(2) of the Act lays down that

> In order to convert a proposal into a promise the acceptance must be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance.

Section 7(2) in fact lays down two rules regarding the manner of acceptance based on the different circumstances:

1) If the proposal does not prescribe any manner of acceptance then it must be performed in usual and reasonable manner. What is a reasonable manner? Of course, it is a question of fact which depends on the circumstances of each and every case. But it seems that the above section using the term 'usual' probably gave an indication regarding what should be treated as 'reasonable' that what is usual that is reasonable.

2) If the proposal prescribes any specific mode and manner then it must be done accordingly. Thus if the proposer requires the answer to be made by e-mail, acceptance cannot be made by post. Whether some particular mode has been prescribed depends upon the inference to be drawn from the circumstances.[1] There is authority for the view that an offer by telegram is evidence of a desire for a prompt reply, so an acceptance sent by post may be treated as nugatory.[2]

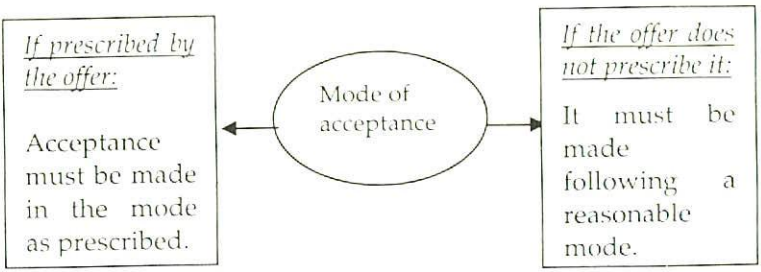
And it is also mentioned in the Act that if the acceptance is not made in the prescribed manner, then if the objection that, he will not accept the acceptance made otherwise than in the manner prescribed by him, is not raised within a reasonable time then the acceptance will be treated as a valid one though not performed in the manner prescribed by him. In England, the Court of Exchequer Chamber opined that a reply sent by some other method equally expeditious would constitute a valid acceptance.[3] An offer must use very clear words to make a mode of communication to be treated as mandatory [4].

It was held in *Bangladesh Muktijoddha Kalyan Trust represented by the Managing Director Vs Kamal Trading Agency and others*[5] that an acceptance must be expressed

---

[1] Cheshire and Fifoot, *Law of Contract*, p.43, see, Kennedy Vs. Thomassen, 1929, 1 Ch 426.
[2] Quenrduaine Vs. Cole, 1883, 32 WR 185.
[3] Tinn Vs. Hoffmann Co, 1873, 29 LT 271.
[4] *See*, in this regard Yates Building Co Ltd Vs. R J Pulleyn & Sons (York) Ltd (1975) 119 Sol Jo 370, reversing (1973) 228 Estates Gazette 1597.
[5] (1998) 50 DLR (AD) 171.

in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted.


If prescribed by the offer:
Acceptance must be made in the mode as prescribed.
Mode of acceptance
If the offer does not prescribe it:
It must be made following a reasonable mode.

Counter offer

Meaning of 'Counter Offer':

The concept 'counter offer' has not been defined any where in the Contract Act, 1872. It is a technical term used in judicial pronouncements. The question of counter offer is related with the nature of acceptance. A counter offer may come upon the scene not bearing its badge upon its sleeve but dressed as an 'acceptance'[1]. The offeree is required to give his assent unconditionally to the exact terms proposed by the offeror, if it is not so identical with the offer then this so called 'acceptance' in fact will be treated as a counter offer. If the acceptance does not become absolute and unqualified as discussed above then two consequences arise:

1. It cannot be a valid acceptance; and
2. It turns into a counter offer.

Let us have an example:
A: I will sell my pen to you for Tk. 20.

---

[1] Cheshire and Fifoot, *Law of Contract*, p.34., 2nd ed.

B: I am ready to purchase it for Tk. 19 or I agree but you have to give me a pen holder at no extra cost.

Here B's statement is not a valid acceptance and it is termed as counter offer in law.

But a mere inquiry does not constitute a counter offer and as such it does not destroy the original offer. The case *Stevension Vs. McLean*[2] is worth mentioning here:

> The defendant offered on Saturday to sell to the plaintiffs 3,800 tons of iron 'at 40s net cash per ton, open till Monday'. Early on Monday the plaintiffs telegraphed to the defendant: 'Please wire whether you would accept 40 for delivery over two months, or if not longest limit you would give'. No reply was received, so by a telegram sent at 1.34 p.m. on the same day the plaintiffs accepted the offer to sell at 40s cash. Meanwhile the defendant sold the iron to a third person and informed the plaintiffs of this in a telegram dispatched at 1.25 p.m. The telegrams crossed.
>
> The plaintiffs sued to recover the damages for breach of contract. To settle the dispute one of the important issue before the court was that whether the first telegram sent by the plaintiffs a counter offer or not. It was held that the plaintiffs did not had not made a counter offer, but had addressed to the defendant 'a mere inquiry, which should have been answered and not treated as a rejection of the offer'.[3]

Legal consequence of counter offer

1. *It rejects the original offer*. At the moment a counter offer is made the original offer becomes dead. So, if someone

---

[2] 1880, 5 QBD 346.
[3] 1880, 5 QBD at p. 350.

makes a counter offer and then he changes his mind subsequently and then would like to be agree on the same terms and conditions as were exactly made by the original offeror without any variation' he cannot so accept the earlier offer, because at the moment he makes the counter offer, the original offer has become dead, i.e., that it does not exist any more to be accepted by the person who rejected it at one time by making a counter offer. In *Hyde Vs. Wrench* :[1]

> The defendant on 6 June offered to sell an estate to the plaintiff for $1,000. On 8 June, in reply, the plaintiff made an offer of 4950, which was refused by the defendant on 27 June. Finally, on 29 June, the plaintiff wrote that he was now prepared to pay $1000.
>
> It was held that no contract existed. By his letter of 8 June the plaintiff had rejected the original offer and he was no longer able to revive it by changing his mind and tendering a subsequent acceptance.

2. *It becomes a new offer.* This counter offer becomes capable of acceptance by the party to whom it is made and if so accepted then a contract arises based on this counter offer not on the offer originally made.

Knowledge of offer: prior condition of acceptance

One must have the knowledge of offer before accepting the same. Because, how will a person accept one offer about which he has no knowledge at all? Therefore it is the well established principle of law that the acceptance in ignorance

[1] 1840, 3 Beav 334.

offer is no acceptance to give rise to a legally binding contract. In *Lalman Shukla Vs. Gauri Datt*[2] :

> The nephew of the defendant ran away from home and no trace of him was found for sometime. The defendant sent his servants to different places in search of the boy and among them was the plaintiff. When the plaintiff had left, the defendant by handbills offered to pay Rs. 501 to anybody discovering the boy. The plaintiff traced the missing boy and then comes to know of this offer. He brought an action to recover the reward and it was failed.
>
> *Justice Banerji* observed: 'In order to constitute a contract, there must be an acceptance of an offer and there can be no acceptance unless there is knowledge of the offer.'[3]

The American case *Fitch Vs. Snedaker*[4] is very clear on this particular point where *Woodruf J*, remarked on the question 'How can there be consent or assent to that of which the party has never heard?'

The Australian case *R* Vs. *Clarke*[5] in fact advanced the rule in *Fitch Vs. Snedaker* one stage ahead which provides that even the mere knowledge of the offer is not sufficient but the fact of offer must be present in the mind of the offeree at the moment of acceptance, otherwise there will not be any acceptance. In this case-

> The Government of Western Australia offered a reward of $1000 'for such information as shall lead to the arrest and conviction of' the murderers of two police officers and added that, if the information should be given by an

---

[2] 1913, 11 All LJ 489.
[3] *Ibid.* at p.492.
[4] 1868, 38 NY 248.
[5] 1927, 40 CLR 227.

> accomplice, not being himself the murderer, he should receive a free pardon. Clarke saw the offer and some time letter gave the necessary information, he claimed the reward from the Crown by petition of right. He admitted not only that he had acted solely to save his own skin, but that, at the time when he gave the information, the question of the reward had passed out of his mind.[1]

He could not recover the reward money as it was held negatively by the court. In the words of *Higgins J*[2]:

> Clarke had seen the offer, indeed, but it was not present to his mind—he had forgotten it and gave no consideration to it in his intense excitement as to his own danger. There cannot be assent without knowledge of the offer; and ignorance of the offer is the same thing, whether it is due to never hearing of it or to forgetting it after hearing.

Chief Justice Isaac has given a classic illustration in this connection to prove the obsoleteness of acceptance in ignorance of offer:

> 'An offer $100 to any person who should swim a hundred yards in the harbour on the first day of the year would not in my opinion be satisfied by a person who was accidentally or maliciously thrown overboard and swam the distance simply to save his life, without any thought of the offer.'

The position of English law is not clear in this respect. In old texts[3] it is seen that the decision in *Gibbons Vs. Proctor*[4] in fact favoured the acceptance of offer by performance of the relevant conditions mentioned in the offer though that is in

---

[1] R Vs. Clarke, *ibid.*
[2] *Ibid.*
[3] Cheshire and Fiffot, *Law of Contarct*, p.47., 2nd ed.
[4] 1891, 64 LT 594.

ignorance of offer. But in a recent text[5] it has been opined that a closer examination of *Gibbons Vs. Proctor* reveals that in that case in fact the person claiming the reward knew of the offer at the time when the information was given to the police. However, the present view does not in any case permit the acceptance in ignorance of offer.

In *Williams Vs. Carwardine*[6] it was held that if the fact of the offer is present in the mind of the offeree at the time of acceptance then the motive of the acceptance will be irrelevant. Here the fact was similar to the facts of *R Vs. Clarke*, 1927 and the argument 'that the plaintiff gave the information to ease her conscience and not for the sake of the reward' was dismissed and made no change in the judgement and it was observed by the King's Bench that 'motive was irrelevant, provided that the act was done with knowledge of the reward. Acceptance was then related to offer'.

In *Bloom Vs. American Switch Watch Co* (1915) App D 100, the Appellate Division of the Supreme Court of South Africa held, disapproving *Gibbons Vs. Proctor*, that, where information had been given without knowledge that a reward had been offered, the informer could not recover the reward.[7]

Acceptance by performance

Section 8 of the Act deals with acceptance by performance and says:

> Performance of the condition of a proposal or the acceptance of any consideration for a reciprocal promise

---

[5] Treitel, *Law of Contract*.
[6] 1833, 5 C & P 566.
[7] Cheshire and Fifoot, *Law of Contract*, p.48.

> which may be offered with a proposal is an acceptance of the proposal.

So, in fact, it waives the requirement of communication, rather it says that the acceptance may be made by the performance of the relevant conditions mentioned in the offer, i.e., if someone does the performance according to the instructions given in the offer then that will be deemed by the law as a valid acceptance though the same was not communicated to the other party. It may be mentioned in the offer or sometimes it will be inferred from the wording and nature of the offer. If someone advertises that 'I will give $100 to any one who can find my lost car out'—if any person with the knowledge of this offer finds out the car then it will be deemed as an acceptance of offer by performance and the finder need not communicate any further fact of acceptance. *Carlill Vs. Carbolic Smoke Ball Co*[1] is a classic illustration of acceptance by performance where the defendant company advertised to pay $100 to any one who will be caught influenza after using a smoke ball produced by the company and Mrs. Carlill used the smoke as per the instructions given by the company and she was caught influenza and sued to recover $100. Her claim was accepted by the Court and the Court rejected the arguments of the defendants, *inter alia*, that the plaintiff should have notified her intention of acceptance to the defendant and the observation made by *Bowen LJ*[2] is remarkable here:

> But there is this clear gloss to be made upon that doctrine, that is notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks

---

[1] 1892, 2 QB 484, affd 1893, 1 QB 256.
[2] 1893, 1 QB 256 pp. 269-270.

A-60932

> it desirable to do so; ... ... and if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification ... ... in the advertisement cases it seems to me to follow as an inference to be drawn from the transaction itself that a person is not to notify his acceptance of the offer before he performs the condition ... ... From the point of view of common sense no other idea could be entertained. If I advertise to the world that my dog is lost and that anybody who brings the dog to a particular place will be paid some money, are all the police or other people whose business it is to find lost dogs to sit down and write me a note saying that they have accepted my proposal?

If acceptance by silence is imposed arbitrarily by the offeror upon the offeree and if the offeree becomes silent after getting the offer as required by the offeror, this mere silence, of course, will not amount to acceptance by performance, because in fact the offeror cannot impose such condition with his offer. In *Felthouse Vs. Bindley* :[3]

> 'The plaintiff, Paul Felthouse, wrote his nephew, Iohn, on 2 February, offering to buy his horse for $30 15s, and adding , 'if I hear no more about him, I consider the horse mine at that price'. The nephew made no reply to this letter, but intimated to the defendant, an auctioneer, who was going to sell his stock, that the horse was to be kept out of the sale. The defendant inadvertently sold the horse to a third party at an auction held on 25 February, and the plaintiff sued in conversion.'[4]

---

[3] 1862, 11 CBNS 869.

[4] *Ibid.*

The action was held to be failed as the court did not see any acceptance of the plaintiff's offer before 25 February. *Willes, J.*[1], remarked:

> It is clear that the uncle had no right to impose upon the nephew a sale of his horse for $30 15s unless he chose to comply with the condition of writing to repudiate the offer.

Inferring acceptance from conduct:

Whether there has been an acceptance by one party of an offer made to him by the other may be collected from the words or documents that have passed between them. It may be inferred from their conduct also and of course this task of inferring an assent and of fixing the precise moment at which it may be said to have emerged is one of obvious difficulty, particularly when the negotiations between the parties have covered a long period of time or are contained in protracted or desultory correspondence.[2] Such a difficult situation arose in *Brogden Vs. Metropolitan Rly Co* [3]:

> 'Brogden had supplied the defendant company with coal for years without a formal agreement at length the parties decided to regularise their relation. The company's agent sent a draft form of agreement to Brogden, and the latter, having inserted the name of arbitrator in a space which had been left blank for this purpose, signed it and returned it, marked 'approved'. The company's agent put it in his desk and nothing further was done to complete its execution. Both parties acted thereafter on the strength of its terms, supplying and paying for the coal in accordance with its clauses, until a dispute arose between them and Brogden denied that any binding contract existed.'[4]

---

[1] *Ibid.*
[2] Cheshire and Fifoot. *Law of Contract*, p. 33. 2nd ed.
[3] (1877) 2 App Cas 666.
[4] *Ibid.*

It was really a difficult point to determine at what moment there was a contract and when did the acceptance take place, if ever. Lastly the Court decided that there was a binding contract and the House of Lords opined that a contract came into existence either when the company ordered its first load of coal from Brogden upon these terms or at least when Brogden supplied it.

Rules regarding communication of proposal, acceptance and revocation:

Communication plays the central role in the formation of a contract and without communication even revocation of proposal or acceptance is also impossible. In fact, the seed for necessity of communication is rooted in the definitions of 'proposal' and 'acceptance', respectively, which is evident from the word 'signifies' used in both the definitions, that there will be no proposal if the expression of willingness is not signified to another, and there will be no acceptance if the assent is not signified to another. The rules regarding communication have been enumerated in sections 3 and 4 of the Act.

When does the communication become complete? Section 4 of the Contract Act, 1872, gives answer to this question which says—

> The communication of proposal is complete when it comes to the knowledge of the person to whom it is made.
>
> The communication of acceptance is complete—
>
> as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;
>
> as against the acceptor when it comes to the knowledge of the proposer.

The communication of revocation is complete—

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to out of the power of the person who makes it;

as against the person to whom it is made, when it comes to his knowledge.

Illustrations

a) *A proposes, by letter, to sell a house to B at a certain price.*

The communication of the proposal is complete when B receives the letter.

B accepts A's proposal by a letter sent by post.

b) *The communication of the acceptance is complete:*

as against A, when the letter is posted—
as against B when the letter is received by A.

c) *A revokes proposal by telegram.*

The revocation is complete as against A when the telegram is despatched. It is complete as against B when B receives it.

B revokes his acceptance by telegram.

A's revocation is complete as against B when the telegram is despatched, and as against B when it reaches him.

Thus the above-mentioned section lays down the following rules:

Communication of proposal: The communication of proposal is complete when it comes to the knowledge of the person to whom it is made. So, here the criterion is only one i.e. it

must come to the knowledge of the person to whom it is addressed. Thus, if A, by a letter posted to B communicates one proposal, and the letter reaches to B on 1st January which is opened and read out by B on the 3rd January, the communication of proposal has become complete on the 3rd of January, not on the 1st day, because it comes to the knowledge of B on the 3rd day of January. This time of communication is important in the sense that before such a communication has become completed no acceptance of that offer is possible. Thus, if in the above example, B on the 2nd day posts a letter to A expressing the same intention what A expected from B, that will not amount to an acceptance, rather that will be treated as a cross offer, because, no question of acceptance arises before the communication of proposal is complete.

Communication of acceptance: In case of face to face transaction the rule is simple, i.e., when the words constituting the acceptance are uttered, the communication of acceptance will be complete as soon as the other party listens to it. But problem arises in case of postal transactions. In fact, section 4 deals with the postal rules of communication of acceptance which says that the communication of acceptance becomes complete in fact in two phases.

First phase of communication of acceptance: as against the proposer: The communication of acceptance becomes complete as against the proposer when it is put in a course of transmission to him, so as to be out of the power of the acceptor. It implies posting the letter of acceptance, because a letter is posted means that the letter is put in a course of transmission to him, so as to be out of the power of the person who posted it. Thus the moment a letter is posted communication of acceptance is complete as against the

proposer, that means at the same moment the proposer becomes bound by his proposal which has been accepted by the other, because the communication of acceptance has become complete as against the proposer, though still the acceptor does not become bound by it because of the reason that communication of acceptance yet not has become complete as against the acceptor.

Second phase of communication of acceptance: as against the acceptor: The communication of acceptance will be complete as against the acceptor when it comes to the knowledge of the proposer. Thus if A posts the letter of acceptance on 01, June, which reaches to B on the 2nd June and B reads it out on the same day, then the communication of acceptance has become complete as against the proposer on the day of posting the letter, i.e., on 01, June; and the communication of acceptance will be complete as against the acceptor on 02, June when the proposer read out the letter of acceptance. So, the acceptor will not be bound before 02, June though he posted his letter of acceptance on the 1st day of June.

However, in every case, the acceptance needs to be communicated to the other party, and till this communication is made no contract will be there. Thus, the tenderer acquired no vested right of a property merely because his tender for that property had not been rejected and his earnest money has not been refunded by the Corporation and as there was no definite communication of acceptance of tender by the Corporation no vested right was acquired by the plaintiff.[1] It is impracticable to consider what are the terms of a particular contract without

[1] Sahana Chowdhury (Widow) and others Vs. Md Ibrahim Khan and another. 6 BLC (AD) 67.

considering precisely what steps constituted the offer and what constituted the acceptance and precisely what particular terms ought to be read into the contract.[2]

Communication of offer and acceptance by telephone

As regards the communication of offer and acceptance by telephone, the rule which is applicable in England may be applied in Bangladesh. Though there is no direct Bangladeshi case law on this particular point, the English law enunciated on this point in *Entorse*[3] case has been generally accepted by the Indian Supreme Court in *Bhagwandas Goverdhandas Kedia Vs. Girdhalal Parshottamdas*[4] and accordingly the law in brief is that the message must be communicated to the other party actually and the mere utterance of the words through any machine will not amount to communication if the other party does not actually hears it. The observation made by *Denning, LJ* in *Entores Ltd. Vs. Miles Far East Corpn.*[5] is worth mentioning here—

> 'Now take a case where two people make a contract by telephone. Suppose, for instance, that I make an offer to a man by telephone and, in the middle of his reply the line goes 'dead' so that I do not hear his words of acceptance. There is no contract at that moment. The other man may not know the precise moment when the line failed. But he will know that the telephone conversation was abruptly broken off, because people usually say something to signify the end of the conversation. If he wishes to make a

[2] Tarain Ch Gupta Chowdhury Vs. Jagannath Rice Mills, (1951) 3 DLR 23.
[3] Entores Ltd Vs. Miles Far East Corpn. (1955) 2 QB 327, 1955 All ER (vol.2) 493.
[4] AIR 1966 SC 543.
[5] (1955) 2 QB 327, 1955 All ER (vol.2) 493.

contract, he must therefore get through again so as to make sure that I heard. Suppose next that the line does not go dead, but it is nevertheless so indistinct that I do not catch what he says and I ask him to repeat it. He then repeats it and I hear his acceptance. The contract is made, not on the first time when I do not hear, but only the second time when I do hear. If he does not repeat it, there is no contract. The contract is only complete when I have his answer accepting the offer.

Lastly take the Telex. Suppose a clerk in a London office taps out on the teleprinter an offer which is immediately recorded on a teleprinter in a Manchester office, and a clerk at that end taps out an acceptance. If the line goes dead in the middle of the sentence of acceptance, the teleprinter motor will stop. There is then obviously no contract. The clerk at Manchester must get through again and send his complete sentence. But it may happen that the line does not go dead, yet the message does not get through to London. Thus the clerk at Manchester may tap out his message of acceptance and it will not be recorded in London because the link at the London end fails or something of that kind. In that case the Manchester clerk will not know of the failure but the London clerk will know of it and will immediately send back a message 'not receiving'. Then, when the fault is rectified, the Manchester clerk will repeat his message. Only then is there a contract. If he does not repeat it, there is no contract. It is not until his message is received that the contract is complete.

In all the instances I have taken so far, the man who sends the message of acceptance knows that it has not been received or he has reason to know it. So he must repeat it.

... ... My conclusion is that the rule about instantaneous communications between the parties is different from the rule about the post. The contract is only complete when

> the acceptance is received by the offeror, and the contract is made at the place where the acceptance is received.'

If we follow the above rule enunciated in British case (*Entorse* case[1]), how will it be justified in the light of section 4 of the Contract Act, 1872? This issue has been resolved neatly by an Indian writer *J. D. Jain*[2] in the following words:

> Section 4 of the Contract Act no doubt says that the communication of an acceptance is complete as against the proposer when it is put in a course of transmission to him, so as to be out of the power of the acceptor, and as against the acceptor it is complete when it comes to the knowledge of the proposer. But it is obvious from the very language used in section 4 about the completion of the communication of an acceptance that those provisions can have no applicability where the parties negotiate a contract in the presence of each other or over telephone. The object of sections 4 to 6 is to fix the point of time at which either party negotiating the contract is precluded from changing his mind. When the parties negotiate a contract face to face or over the telephone, no question of revocation can possibly arise for in such instantaneous communication a definite offer is made and accepted at once and the same time. But where the parties are at some distance and have to negotiate a contract by letter or messenger, there is necessarily an interval of time during which there is a possibility of the offeror as well as the acceptor changing mind. Sections 4 to 6, therefore, are intended to fix the point of time at which either party is precluded from revoking the offer or acceptance. Section 4, when it speaks of the communication of an acceptance becoming complete as against the proposer when it is put in course of transmission to him so as to be out of the

---

[1] Entores Ltd Vs. Miles Far East Corpn. (1955) 2 QB 327, 1955 All ER (vol.2) 493.

[2] Jain, J.D., *The Indian Contract Act*, 15th ed., 1988, Allahabad Law Agency, p. 39.

power of the acceptor, and as against the acceptor when it comes to the knowledge of the proposer, necessarily contemplates two different points of time. But it is easy to see that even on the application of the language of the material provisions of section 4 in the contracts negotiated personally or over the telephone the communication of an acceptance is complete as against both the proposer and the acceptor almost if not completely at the same point of time. For acceptance by spoken words transmitting through the medium permeating space cannot be said to be effectually put in a course of transmission to the proposer so as to be out of the power of the acceptor uttering the words of acceptance, unless they are loud enough to be audible to the proposer and are heard by him; and if the words of acceptance have been heard by the proposer, the acceptance comes to his knowledge. Thus the effective emanation of acceptance from the acceptor and proposer's knowledge of acceptance are instantaneous. There is thus no room for the applicability of the provisions of section 4 relating to communication of acceptance to such contracts. In fact, they were never intended to apply to contracts made by telephone or by other modern methods of instantaneous communication which were unknown in 1872 when the Contract Act was enacted and were not in the contemplation of the framers of the Act. As the provisions of section 4 about the completion of the communication of an acceptance do not apply to contracts made by telephone or by other communications which are virtually instantaneous, so the general rule that acceptance of an offer must be communicated to the offeror has to be followed in such contracts. In a contract negotiated orally by the parties in the presence of each other there can be no binding contract until the offeror receives the acceptance by hearing and understanding it. In contracts made by telephone, the parties are no doubt at a distance. But communication is instantaneous and oral. The rule that acceptance is incomplete until received, heard and

> understood by the offeror would, therefore, govern contracts negotiated over the telephone no less than those settled in oral negotiations in the physical presence of the parties (*Kanhaiyalal Indermal Vs. Dineshchandra Mahesh Kumar*, A.I.R. 1959 M.P. 234).

Postal rule of communication

The communication of acceptance becomes complete in two phases if made by post according to section 4 of the Contract Act as discussed earlier. But English Law is different on this point which says that such an acceptance by post becomes complete as soon as the letter of acceptance is posted. *Ewan Mckendrick*[1] neatly sums up the position of the law in England on this point in the following words:

> When does an acceptance sent through the post become effective? Is it when the acceptance is posted by the offeree, when it is posted through the letter box of the offeror or when it is opened and read by the offeror? One might have expected the answer to be that acceptance occurs upon communication of the acceptance to the offeror (whether that communication takes place upon receipt or upon actual reading of the letter) but English law has adopted the former view, namely that acceptance takes place upon posting of the letter of acceptance. This rule has been the subject of considerable criticism and it has no been adopted in many other jurisdictions in the world. Yet the rule is one of some antiquity in English law (the case that is commonly cited as authority for the existence of the rule is *Adams Vs. Lindsell*, 1818, 1 B & Ald 681, but its place was not secured until the later decision of the House of Lords in *Dunlop Vs. Higgins*, 1848, 1 HLC 381) and is now unlikely to be uprooted judicially. Rather,

[1] Mackendrick, Ewan. *Contract Law: Text, Cases and Materials*, 1st edition, 2003, Oxford University Press, UK, p. 117.

the courts are likely to widen the exceptions to the general rule rather than attempt to abolish the general rule itself.

Difference between Bangladeshi law and English law:

In England, once a letter of acceptance is posted the acceptance becomes complete at once forever which cannot be revoked. Even that acceptance through the posted letter cannot be revoked by any subsequent quicker way of communication, e.g., by telegram arriving before the letter of acceptance reaches the offeror. Whereas, in Bangladesh such a revocation is possible even after posting the letter of acceptance under the express provisions of sections 4 and 5. *J. D. Jain*[1] gives a wonderful illustration of accidental formation of contract, which is worth mentioning here—

> 'A' makes a proposal to B, B accepts the proposal and posts a letter to that effect on 26th October. On the same day B sends a telegram revoking his acceptance and it so happens that both the telegram and the letter reach A at the same time when he was out for a walk. The servant takes delivery of both and keeps them on the master's table. On return 'A' reads the telegram first and then the letter. In this case there will be no binding contract between 'A' and 'B' because the communication of revocation comes to A's notice first then the communication of acceptance. But if 'A' reads the letter first and then the telegram comes there will be a binding contract between them. Such contracts are called accidental form of contracts because they depend merely on a matter of chance.

When does the contract become complete?

Under English law, in case of acceptance made by post, the communication of acceptance becomes complete as soon as

[1] Jain, J.D., *The Indian Contract Act*, 15th ed., 1988, Allahabad Law Agency, p. 42.

the letter of acceptance is posted and the contract is also completed at the same moment, even if the letter does not reach the destination ever.[2] But what is the law in Bangladesh? As it has been discussed earlier, in Bangladesh, in case of acceptance made by post, the communication of acceptance becomes complete in two phases. But when is the contract concluded? The rule which is generally followed in Indian sub-continent is that the contract is concluded at the first phase of communication of acceptance, i.e., when the letter of acceptance is posted.[3]

If we follow this principle a problem may arise in the circumstance where the letter never reaches the other party, because, in Bangladesh the communication of acceptance does not become complete as against the acceptor unless the letter of acceptance reaches to the other party according to section 4 of the Act. So, under such circumstances, how can a contract be concluded where even the communication of acceptance has not yet become complete totally? Rules of communication of acceptance by post in Bangladesh are different from English Law because of the clearly different drafting of section 4 of the Act. So, such conflicting situation arises if we follow the English law in this regard. Suppose, if it is taken that the contract is concluded when the letter of acceptance is posted, then what will happen if the acceptor revokes his acceptance by any quicker method? The acceptance will be revoked under section 5, but if it is deemed that the contract was concluded beforehand when the letter was posted then obviously how can the acceptance be revoked after conclusion of legally binding contract? Well, if the acceptor is given an option to revoke his

---

[2] Adams Vs. Lindsell, 1818, 1 B & Ald 681.

[3] Kamisetti Subbiah Vs. Katha Venkataswamy (1903) ILR 27 Mad 355.

acceptance before his letter of acceptance reaches the other party, then it appears, if we follow English law regarding the moment of conclusion of a contract, that during the time when the letter of acceptance is in the transit the contract really becomes a voidable one, because it becomes binding on the offeror whereas the acceptor becomes still at liberty to revoke his acceptance. But, is it really so? The answer is, 'no', as our Act is silent about the issue. If the letter of acceptance does not reach to the other party, what will be the legal consequence? Our Act is silent about it also. May be the reason of such anomalous situation is the absence of any clear statutory provision regarding the moment of conclusion of a contract.

Communication of revocation

The rules regarding communication of revocation are more simple. Section 4 simply says that the communication of revocation is complete as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to out of the power of the person who makes it; and as against the person to whom it is made, when it comes to his knowledge.

How is a communication made?

Section 3 of the Act reads out:

> The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

So, it means that the communication of proposal, acceptance or revocation can be made by two ways:

1) By the act or omission of the concerned party which intended it.

2) By the act or omission of the party which though did not intend it clearly but it has the effect of such communication of proposal, acceptance or revocation.

Revocation of offer

Two questions may arise in this regard :

When can an offer be revoked?

Section 5 of the Contract Act deals with this issue and says:

> A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer but not afterwards.

Thus the law makes the time for revocation of offer very clear saying that if the proposer likes to revoke it then he must do so before the communication of its acceptance is complete as against the proposer and it cannot be revoked after the communication of acceptance of such proposal is complete as against the proposer. When such communication becomes so complete that has been shown in section 4. Thus the last time for revocation of offer is the moment when the communication of acceptance has become complete as against the proposer, i.e., the moment when the letter of acceptance is posted by the acceptor towards the proposer.

How can an offer be revoked?

An offer once made does not make it irrevocable, rather it may be revoked within the framework of law. Section 5 says

about the last time within which an offer may be revoked and section 6 lays down the mechanisms or different ways of revocation of offer. Section 6 of the Act says—

A proposal is revoked—

1) By the communication of notice of revocation by the proposer to the other party;

2) By the lapse of time prescribed in such proposal for its acceptance, or, if no time is so prescribed by the lapse of reasonable time, without communication of acceptance;

3) By the failure of the acceptor to fulfill a condition precedent to acceptance; or

4) By the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

Thus according to section 6 an offer may be revoked by the following modes:

1) By notice;
2) By lapse of time;
3) By non-fulfillment of condition precedent;
4) By death or insanity.

1) *By notice:* An offer may be revoked by communication of notice of revocation by the proposer to the other party. Thus an offer may be revoked by notice of revocation subject to the satisfaction of the following conditions:

   i. The notice of revocation must be communicated to the other party.

ii. Such communication must be made by the proposer to the other party. So, if the other party knows it purely from a stranger, then it will not amount to revocation of offer. Thus, the Act makes it a condition for revocation of offer by communication of notice of revocation that such notice must be served by the proposer to the other party. Obviously here the proposer also includes his authorized agent to do so, but it will not suffice if the other party becomes aware of the fact of revocation purely from any stranger source. This particular provision distinguishes Bangladeshi law from English law where such condition of service of notice to be made by the proposer is not obligatory. Thus in England, the offer will be revoked if the other party becomes aware of the fact of revocation of offer from whatever source the other party knows about it.

2) ***By lapse of time:*** An offer may also be revoked by the expiry of a certain time. Because, once an offer is made does not necessarily mean that it has to be open for acceptance forever. Thus for the purpose of such revocation the offers may be categorized into two categories:

i. *Offer with stipulated time:* Sometimes there may be an offer which bears with it the time for its acceptance that it cannot be accepted after the expiry of that period. In that case, after the expiry of that stipulated time, if the offer is not accepted, it will be revoked automatically.

ii. *Offer without stipulating time:* Even there may be an offer which does not say anything regarding its

duration to remain open for acceptance. In other words, if the offer does not mention the last time for its acceptance, then the offer will be revoked automatically after the expiry of a reasonable time and what is a reasonable time that is a question of fact which depends on the nature of each transaction and other relevant circumstances. Thus in case of selling of gold an offer generally will not be open for more than twenty four hours since the price of gold fluctuates everyday. But an offer to sell a piece of land generally will remain open for a few months. Thus, it was held in *Gladstone Vs. A.B.M. Shayesta Khan*[1], what is reasonable time within the meaning of section 6(2) of the Contract Act, 1872 is undoubtedly dependant upon the facts and circumstances of each case. It was held-

> Understanding given by the plaintiff to the defendant company for completion of the construction of bungalows for the defendant within 4 months' time from 17.11.50 not fulfilled—defendant company paid a large sum of money to the plaintiff for construction in advance—with the expiry of 4 months time defendant extended further time to the plaintiff to complete construction and also paid further sums of money construction remained incomplete even till 7.3.52 when the defendant company took possession of the incomplete bungalow—plaintiff failing to comply with the terms of the contract, the defendant company served a notice on 27.12.55 in which ten days time was given to complete the construction in default it was said it would amount to failure to fulfill the contract—the

[1] (1976) 28 DLR 345.

repudiation of contract on 27.12.55 by the defendant company quite legitimate—No plea can be set up on that account.[2]

3) *By non-fulfillment of condition precedent:* An offer may be revoked by non-fulfillment of a condition precedent by the other party in time. An offer may be conditional or unconditional. Again a conditional offer may be conditional on a condition precedent, i.e., the condition which has to be satisfied before the acceptance of that offer. Suppose, if A tells B that he is ready to sell his car to him provided B gets first class in LL.B. (Honours) examination and the result is published but it is found that B has not got first class, then the offer will be revoked for non-fulfillment of the condition precedent.

4) *By death or insanity:* An offer also may be revoked by death or insanity of the proposer. But the condition is that the fact of the death or insanity of the proposer must come to the knowledge of the offeree before the acceptance made by him. Thus, if the fact of the proposer does not come within the knowledge of the acceptor before acceptance then the offer will not be revoked though the proposer dies actually. So, the death or insanity of the proposer does not make the offer revoked *ipso facto*, rather that becomes conditional on the fact that the acceptor must know about the death or such insanity of the proposer before the acceptance made by him. If unknowingly of the death or insanity of the proposer the offeree makes the acceptance then the acceptance will be operative and the offer will not be treated as

---

[2] *Ibid.*

revoked. In fact, this is the clear meaning of this section, but the section does not distinguish between offers of personal nature, i.e., offer which involves the personal skill or performance, e.g., offer to sing a song or to paint a picture, and offers involving proprietary matters, the performance of which is not dependant on the personal skill or performance of the proposer, e.g., offer to sell a car. This distinction is important in the sense that an offer personal nature is no more possible to be performed after the death or insanity of the proposer, whereas this is possible in case of offers involving only proprietary matters. But the law plainly imposes the condition of becoming aware of the fact of the death or insanity of the proposer before acceptance to make the proposal revoked in every type of offer. Thus if an offeree accepts, being ignorant about the death of a proposer, the offer which is about to sing in a concert, according to this section the offer will not be revoked and the acceptance will be operative, but how will it be performed? Section 6 is silent about it.

Revocation of acceptance

When can an acceptance be revoked?

Section 5 of the Act lays down—

> An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

Thus mere posting the letter of acceptance by the acceptor does not amount to the legal consequence that the acceptor will be bound by it, rather he will be bound by it only when

it comes to the knowledge of the proposer. And obviously one should be left at liberty to revoke one by which he has not become still bound by the law. Thus an acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, and such communication becomes complete when the fact of acceptance comes to the knowledge of the proposer and in no case the acceptance can be revoked after the moment when the communication of acceptance becomes complete as against the proposer, i.e., after the moment when the fact of acceptance comes to the knowledge of the proposer, because at the same moment the acceptance will be complete as against the acceptor by which he will also become bound.

In fine, it is clear that the offer cannot be revoked after acceptance is made and it has been made clear by the following classic illustration by *Sir William Anson*:

> Acceptance is to offer what a lighted match is to a train of gunpowder. It produces something which can not be recalled or undone. But the powder may have lain till it has become damp, or the man who laid the train may remove it before the match is applied. So an offer may lapse for want of acceptance, or be revoked before acceptance. Acceptance converts the offer into a promise, and then it is too late to remove it [1].

[1] Anson's Law of Contract, ed. 1999, p. 60.

CHAPTER 3

CAPACITY OF PARTIES

Qualifications of the Parties:

The law does not give license to everyone to enter into a contract, rather the Contract Act, 1872, prescribes certain specific qualifications to attain to be competent to enter into a contract. Section 10 of the Act lays down certain requirements to be fulfilled to turn an agreement into a contract and competency of the parties is one of those conditions and accordingly the first requirement is that the parties must be competent to enter into a contract. Section 10 does not speak further about the competency of the parties. Section 11 is the further elaboration of the principle laid down in section 10 about competency of parties and who are competent to contract that is mentioned in section 11:

> 'Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

So, if we dissect the section then we get three conditions to be fulfilled by a person to be competent to enter into a contract, that the person is—

1. of the age of majority;
2. of sound mind; and
3. not disqualified from contracting by any law to which he is subject.

Thus we can express the competency of parties negatively, that the following persons cannot enter into a contract:

(1) minors;

(2) persons of unsound mind; and

(3) persons disqualified by any law.

Now let us discuss the qualifications one by one.

The person must be of the age of majority

To be competent to enter into a contract one must attain the age of majority according to the law by which he is governed. It clearly indicates that each and every legal system prescribes a particular age as the age of majority which also may vary from state to state. Now, the question is what is the age of majority in Bangladesh?

Age of majority

Though section 11 of the Act speaks that the person to enter into a contract must be of the age of majority it does not prescribe the age of majority and that is in fact determined by the Majority Act, 1875. According to section 3 of the Majority Act, 1875, the age of majority is 18 years unless the superintendence of his property as been assumed by the Court of Wards in which case it is 21 years. In England a person becomes major on attaining 18 years in all cases.[1]

The person must be of sound mind

The second qualification to enter into a contract is that the person must be of sound mind. Again section 11 mentions the requirement of being sound mind only and it remains

[1] Section 1 of the Family Law Reform Act, 1969.

silent about the question 'who is a person of sound mind?' and section 12 gives this answer which specifically mentions the meaning of sound mind for the purpose of entering into a contract. Section 12 of the Act says—

> A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.
>
> *Illustrations*
>
> (b) A sane man, who is delirious from fever or who is so drunk that he cannot understand the terms of a contract or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.'

So, it appears from the wording of section 12 that for the purpose of making a contract a person will be deemed to be of sound mind if he has the capability to do the following two things:

1. to understand the contract; and
2. to form a rational judgement considering its effect upon his own interests.

So, a person who does not have the above two capabilities will be treated by the law as a person of unsound mind and as such to be incompetent to enter into a contract. A person may lose this capability due to idiocy, lunacy, drunkenness etc. *Justice Sinha* in an Indian case nicely analyzed the provision of section 12 in the following ways:

> According to this section, therefore, the person entering into the contract must be a person who understands what he is doing and is able to form a rational judgement as to whether what he is about to do is to his interest or not.

> The crucial point, therefore, is to find out whether he is entering into the contract after he has understood it and has decided to enter into that contract after forming a rational judgement in regard to his interest ... ... It does not necessarily mean that a man must be suffering from lunacy to disable him from entering into a contract. A person may to all appearances behave in a normal fashion, but, at the same time he may be incapable of forming a judgement of his own, as to whether the act he is about t do is to his interest or not [1].

Contract in *lucid interval*

Unsoundness of mind sometimes may be occasional. What is the rule of law regarding such type of unsoundness? Second paragraph to section 12 of the Act deals with this specific issue:

> A person, who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.
>
> A person, who is usually of sound mind, but occasionally of sound mind, may not make a contract when he is of unsound mind.
>
> *Illustration*
>
> (a) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

Accordingly, we see that section 12 lays down two rules regarding it:

1. If the person is usually of unsound mind, but occasionally of sound mind, can enter into a contract at the time when he becomes of sound mind.

---

[1] Inder Singh Vs. Parmeshwardhari Singh, AIR 1957 Pat 491.

2. If the person is usually of sound mind, but occasionally of unsound mind, he cannot enter into a contract when he becomes of unsound mind. In other words in such case also one can enter into a contract when he is of sound mind.

A common phenomenon is found in both the rules that a person can enter into a contract only when he is of sound mind, and in no case he is permitted to enter into a contract when he will be of unsound mind, either it is occasional or usual in his case.

Agreement by a person of unsound mind

Effect of agreement entered into by a person of unsound mind

In Bangladesh, the agreement of a person of unsound mind is void. But the provision of English law on this particular point is different where the contracts of persons of unsound mind are generally voidable.

The person must not be declared disqualified by the law

The third requirement of competency to contract is that the person must not be declared by the law disqualified to enter into a contract. It clearly indicates that the law sometimes may prohibit certain persons to enter into a contract or that one can not enter into a contract with such and such persons. If the person is within that prohibited degree of disqualified persons then there cannot be any contract with that person. Suppose the law declares an insolvent person as disqualified to enter into a contract and one cannot enter into a contract with the citizens of enemy states.

So far, the conditions of competency have been discussed. Now, let us consider a specific issue relating to the violation

of the first condition, that means what will be the effect if a person enters into an agreement who is not of the age of majority. This specific issue rather is preferred to be discussed under a separate heading on 'minor's agreement'.

Minor's agreement

Who is a minor?

A person who has not attained the age of majority is a minor. So, in Bangladesh every person under the age of 18 years is a minor in the eye of law.

Can a minor enter into a contract?

A minor cannot enter into a contract. Because section 11 of the Act categorically bars a person from entering into a contract who has not attained the age of majority, and accordingly a minor is incompetent to enter into a contract.

Nature of Minor's Agreement

What will be the nature of a minor's agreement? Section 10 of the Contract Act, 1872, lays down that competency of parties is required for the validity of a contract and section 11 mentions the criteria of competency and the total impact of these two sections is that a minor is an incompetent person to enter into a contract. So, if a minor enters into an agreement then that one will never turn into a valid contract, as section 10 requires the competency of parties as a prior condition to turn an agreement into a contract. So, it is clear that a minor cannot enter into a contract. But if a minor enters into an agreement what will be the legal status of that agreement? This question is not solved clearly by the Act, whereas in English law minor's agreements are generally voidable. So, being influenced by the English cases

our courts sometimes considered it as voidable. But this issue was finally settled in 1903 in the famous case of *Muhuri Bibi Vs. Dharmadas Ghose* [1] where it was held that a minor's agreement is void *ab initio*, that means without of any legal effect at all—it is born as a void one. In deciding the case Sir Lord North observed:[2]

> Looking at Section 11 there Lordships are satisfied that the Act makes it essential that all contracting parties should be competent to contract and expressly provides that a person who by reason of infancy is incompetent to contract cannot make a contract within the meaning of the Act. The question whether a contract is void or voidable presupposes the existence of a contract within the meaning of the Act, and cannot arise in the case of an infant.

The Contract Act, 1872, laid down that a minor cannot enter into a contract and the rule enunciated in *Muhuri Bibi Vs. Dharmadas Ghose*[3] is a further advancement of this rule which made it clear that 'what will be the consequence of a minor's agreement?'. So, now it is the established rule of law in Bangladesh that a minor's agreement is void *ab initio* and as such it has no legality at all. A transaction which is void is a nullity; it does not exist and never existed in the eye of law.[4]

Application of doctrine of 'estoppel' against minor

Meaning of 'estoppel'

Estoppel may be described as a rule by which, in some cases, one will not be allowed to plead the contrary of a fact

---

[1] (1903) 30 1A 114; 30 Cal 539.
[2] *Ibid.*
[3] *Ibid.*
[4] 1 PLR (Dac) 627.

or state of things which he has formerly asserted by words or conduct.[5] This is a principle of law of evidence which has been embodied in section 115 of the Evidence Act, 1872, as applicable in Bangladesh. Section 115 of the Evidence Act, 1872, says-

> When one person has, by his discretion, act or omission intentionally caused or permitted another person to believe a thing to be true, and to act upon such belief, neither he nor his representatives shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.

In fact section 115 of the Evidence Act, 1872, is founded on the rule laid down in the famous case of *Pickard Vs. Sears*, 1831 where it is observed that:

> Where one by his words or conduct willfully causes another to believe in the existence of a certain state of things and induces him to act on that behalf so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time [6].

Is it applicable against minor?

No, it is not applicable against the minor. In fact, the question of applicability of this rule against the minor arises when he misrepresents himself as a person of the age of majority and as such enters into a contract, then the question arises whether the minor can deny his earlier statement as regards his age. Since the doctrine of estoppel is not applicable against the minor so a minor will be permitted to deny his earlier misstatement regarding his age.

---

[5] Sarker's *Law of Evidence*, 12th ed., p.1029.
[6] 1831, A & E 468.

Reason for non-applicability of 'estoppel' against minor

The doctrine of 'estoppel' cannot be applied against the minor, because, there is no estoppel against the statute. If we analyze a case where a minor represents him as a major person then if the minor is not given the opportunity at subsequent time to deny his wrong statement then the ultimate consequence will be that a minor's agreement will be enforceable by law. In other words, if a minor is prohibited by the application of 'estoppel' to deny his wrong representation then such application in fact ultimately will validate the minor's agreement. But the policy of the statute is that a minor cannot enter into a contract. So, if 'estoppel' is so applied then it will go against the policy of the statute. But there cannot be any 'estoppel' against the statute. So 'estoppel' is not applicable against the minor.

Doctrine of 'Restitution'

This an equitable doctrine which means that if a minor takes any property or goods by misrepresentation of his age, then he will be compelled to restore things so obtained so long as the goods will be found in his possession and if the goods are already sold or converted by the minor, he can not be compelled to repay the value of goods, because that would amount to enforce a void agreement. The well known authority of this doctrine of restitution of equity is *Leslie (R) Ltd. Vs. Sheill.*[1]

Ratification of minor's agreement

Since a minor's agreement is void *ab initio* in Bangladesh, so there is no scope of its ratification at subsequent time even

[1] (1914). 8 Term Rep 335.

when the minor will attain the age of majority. Because, an agreement having no legal effect at all can never be awarded the enforceability. It was held in *Julhash Mollah (Md) and another Vs. Ramani Kanta Malo and another*[2] that an agreement which is void *ab initio* cannot be validated by ratification.

Beneficial Contracts

The general law is that the minor's agreement is void[3]. It is argued that this rule is to be confined only in the cases where the minor has to bear any obligation. But if a minor does not need to bear any obligation, rather he can enjoy only benefit, what will happen in that case? It was observed in *Ashraf Ali Vs. Etim Ali*[4] that—

> in an executed contract where the minor's part has been performed and nothing is left to be executed by the minor, i.e., obligation is left to be discharged by the minor and to be enforced against him, such a contract is enforceable by the minor as it is a contract for the benefit of the minor, such as completed by sale or, mortgage in favor of the minor and is enforceable in law.
>
> Sections 10 and 11 of the Contract Act enacted for the benefit and protection of the minor cannot be made to operate against the minor.
>
> In a lease by the minor in favor of the defendants and of which the lease-hold property was given in possession of the defendants, there is no obligation on the part of the minor which can be enforced by the defendants lessees.

---

[2] (1995) 47 DLR (AD) 35.
[3] Muhuri Bibi Vs. Dharmadas Ghose, (1903) 30 Cal 539.
[4] (1959) 11 DLR 185.

The opinion expressed in *General American Insurance Co. Ltd. V. Mandanlal Sonulal*[1] is also worth mentioning here. It was held that

> the provision of the law which make a contract by a minor not binding were no doubt intended to be for the benefit of the minors, and the courts in this country when faced with a contract which has been carried out by or on behalf of the minor, the performance of which by the other party is then raised on the ground of minority, have struggled hard to avoid holding the contract wholly void to the detriment of the minor.

Contracts of Apprentice or of service

Though according to English Law the minor would be liable in the case of a contract of service where the contract was for his benefit, it is clear that under section 11, the minor's contract (it should be agreement) being void, the minor would not be held liable.[2]

Liability for Necessaries

In Bangladesh, minor's agreements are generally void *ab initio*. If this is so, sometimes it will be difficult absolutely for the minors to survive, because then no body will be interested to enter into a contract with a minor, even though that becomes a fundamental necessity for that minor. The law thus gives a scope for minor to enter into certain types of transactions, but of course it must be kept in mind carefully that the law still does not permit a minor to enter into a contract, rather the law merely provides a scope for

---

[1] (1935) 59 Bom 656.

[2] Desai, J., in Raj Rani Vs. Prem Adib. AIR 1949 Bom 215.

certain types of transaction in special cases imposing certain liabilities upon the minor which are of course not contractual in nature. The law is embodied in section 68 of the Contract Act, 1872:

> If a person, incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.
>
> *Illustrations*
>
> (a) A supplies B, a lunatic, with necessaries suitable to his condition in life. A is entitled to be reimbursed from B's property.
>
> (b) A supplies the wife and children of B, a lunatic, with necessaries suitable to their condition in life. A is entitled to be reimbursed from B's property.

Meaning of 'necessaries'

The key term used in the above section is "necessaries", because the question of liability will arise only if necessaries supplied by any person. So, the term 'necessaries' is to be defined clearly.

It is mentioned in section 68 with 'necessaries' the terms 'suited to his condition in life' which clearly indicates that the concept of 'necessaries' is not absolute, rather it is a variable idea which of course differs based on the condition of life. In fact, this has been made clear in some cases, the study of which shall provide us a clear idea about the meaning of the term 'necessaries'.' In this regard, we will

concentrate on some English law cases where the meaning of necessaries has been made clear.

In *Chappel Vs. Copper*[1], Alderson B observed:

> Things necessary are those without which an individual cannot reasonably exist. In the first place, food, raiment, lodging and the like. About these there is no doubt. Again, as the proper cultivation of the mind is as expedient as the support of the body, instruction in art or trade, or intellectual, moral and religious information may be necessary also. Again, as man lives in society, the assistance and attendance of others may be a necessary to his well-being. Hence, attendance may be the subject of an infant's contract. Then the classes being established, the subject matter and extent of the contract may vary according to the state and condition of the infant himself. His clothes may be fine of course according to his rank; his education may vary according to the station he is to fill; and the medicines will depend on the illness with which he is afflicted, and the extent of his probable means when of full age. So again, the nature and extent of the attendance will depend on his position in society ... ... But in all these cases it must first be made out that the class itself is one in which the things furnished are essential to the existence and reasonable advantage and comfort of the infant contractor. Thus, articles of mere luxury are always excluded, though luxurious articles of utility are in some cases allowed.

In *Peters Vs. Fleming* the Court opined that the word necessaries is not confined to articles necessary to the support of life, but includes articles and services fit to maintain the particular person in the station of life in which he moves.[2]

---

[1] (1844) 13 M & W 252, 258.

[2] (1840) 6 M & W 42 at 46-47. *Per* Parke B.

To render an infant liable for necessaries it must be proved, not only that the goods are suitable to his station in life, but also that they are suitable to his actual requirements at the time of their delivery and if he is already sufficiently provided with goods of the kind in question, then, even though this fact is not known to the plaintiff, the price is irrecoverable.[3] Thus in *Nash Vs Inman*[4] a Savile Row tailor sought to recover £122 19s for clothes including 11 fancy waistcoats, supplied to an infant, a Cambridge undergraduate, the action failed, because the evidence showed that the defendant was already amply supplied with clothing suitable to his position.

The following points are found regarding 'necessaries':

i. Thing must be essential.

ii. It will be determined based on one's condition and station of life.

iii. Though a particular thing is treated as necessary per se, that does not amount to the fact that an unlimited number or quantity of that thing will be treated also as necessaries. Thus, it also must be considered whether the minor has got already adequate supply of the said necessaries.

iv. Food, cloth, shelter, medical treatment, these are treated as necessaries *prima facie*.

v. One particular thing may be proved as essential at any time based on that peculiar circumstance, then that will be necessaries, though that same may not be treated as necessaries in ordinary times.

---

[3] Cheshire and Fifoot, *Law of Contract*, p.381, referring the case Barnes & Co Vs. Toye (1884) 13 QBD 410; Nash Vs. Inman (1908) 2 KB 1.

[4] *Ibid.*

vi. Thus it varies from person to person, time to time and circumstance to circumstance.

vii. In fine it may be summarized, as, things which are essential to survive reasonably as human being are necessaries.

Nature of Liability of minor for necessaries

The liability of minor for necessaries is clearly determined by the law in Bangladesh. Section 68 of the Contract Act, 1872, says that a right is conferred upon the person who supplies the necessaries to a minor to be reimbursed from the property of the minor. Here the minor has an extended liability that the minor will be liable to reimburse the supplier even if the necessaries supplied to the person whom he is legally bound to support. It follows two things:

i. *Nature of liability:* The nature of such liability is quasi contractual, and in no case it is contractual.

ii. *Extent of liability:* Minor is not personally liable rather his liability is limited against his property.

CHAPTER 4

FREE CONSENT

Free consent is an essential element of a valid contract. It is natural that for an agreement both parties to it must come to a common point. For that reason consent has become an essential element of an agreement. To constitute a contract even mere consent is not sufficient, rather the consent must be *free consent* according to law. First of all, we have to know the meaning of consent, then the criteria to be a free consent.

Meaning of 'consent'

Section 13 of the Contract Act, 1872, says that—

> two or more persons are said to consent when they agree upon the same thing in the same sense.

Thus, there are two statutory requirements to be a consent that the consent must be given

i. To the same thing, and

ii. In the same sense.

So, if the parties agree upon different things or in different senses then this will not be treated as 'consent'. Of course, the term 'thing' used in the first requirement means 'the contents of agreement'.

Meaning of 'free consent'

Section 14 defines 'free consent'. It reads out—

> Consent is said to be free when it is not caused by—
>
> 1) Coercion, as defined in section 15, or
>
> 2) Undue influence, as defined in section 16, or
>
> 3) Fraud, as defined in section 17, or
>
> 4) Misrepresentation, as defined in section 18, or
>
> 5) Mistake, subject to the provisions 20, 21, and 22.
>
> Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

Thus, to be a free consent, that must not be caused by any of these five factors i.e. Coercion, Undue Influence, Fraud, Misrepresentation and Mistake. In other words, if a consent is given being affected by any of the above five factors, the consent will not be treated by the law as a 'free consent'.

When will it be deemed that a consent has been caused by any of these five factors? Second paragraph to section 14 answers to this question as that the consent will be deemed to be so caused when it would not have been given but for the existence of any of such elements. So, the mere existence of any of such elements is not sufficient, rather it must be proved that there is a 'causal connection' between that element and the consent obtained.

Let us now have a detail discussion of the above five factors from which a consent must be free.

Coercion

Section 15 of the Contract Act, 1872, defines coercion. It says—

> 'Coercion' is the committing, or threatening to commit, any act forbidden by the Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.
>
> *Explanation.* —It is immaterial whether the penal code is or is not in force in the place where the coercion is employed.
>
> *Illustration*
>
> A, on board an English ship on the high seas, causes B, to enter into an agreement by an act amounting to criminal intimidation under the Penal Code. A afterwards sues B for breach of contract at Chittagong. A has employed coercion, although his act is not an offence by the law of England, and although section 506 of the Penal Code was not in force at the time when or place where the act was done.

Analyzing the above definition we see that there are two types of elements of coercion:

1. Substantial element; and
2. Psychological element.

1. *Substantial element:* To be a coercion any of the following four acts must take place—

   i. Committing any act forbidden by the Penal Code, 1860.

ii. Threatening to commit any act forbidden by the Penal Code, 1860.

iii. Unlawful detaining any property, to the prejudice of any person whatever.

iv. Threatening to detain, any property, to the prejudice of any person whatever.

It is worth mentioning here that the explanation to section 15 makes it clear that it is immaterial whether the Penal Code, 1860, is or is not in force in the place where the coercion is employed. So, if someone does any of the above acts in any place other than Bangladesh where the penal code is not in force that will not prevent the act to be termed as coercion because of this reason. Only material fact is that whether any of the above acts has been committed as such or not. The above illustration given with section 15 makes this principle clear.

2. *Psychological element:* It requires that the above act must be done with the intention of causing any person to enter into an agreement. That means, there must be an interrelated chain of causation that the act is committed with the purpose of obtaining the consent from the other party. So, if such intention cannot be proved there will not be any coercion for the purpose of this section. Of course, the existence of such intention will be proved either by direct evidence or will be inferred from the circumstances.

Undue influence

Section 16 says—

(1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are

such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another:

(a) where he holds a real or apparent authority over the other or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person hi a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of section 111 of the Evidence Act, 1872.

Illustrations

(a) A, having advanced money to his son, B, during his minority, upon B's coming of age obtains, by misuse of parental influence, a bond from B For a greater amount than the sum due in respect of the advance. A employs undue influence.

(b) A, a man enfeebled by disease or age, is induced, by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services. B employs undue influence.

(c) A, being in debt to B, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.

(d) A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.

Ingredients of undue influence:

Two ingredients must be present to prove that a contract is induced by undue influence:

1. *Nature of relationship:* The relationship subsisting between the parties is of such nature that one of the parties is in a position to dominate the will of the other. In other words, one of the two parties of a contract is in a superior position and the superiority is as regards the control of the other's power of will. That means that superior party will be in such position that he can dominate the decision making of the other party. So, it is one type of psychological control over the other. This is the first requirement to exist to prove undue influence.

2. *Use of relation:* Mere existence of the above relation is not sufficient to constitute 'undue influence'; rather the second condition is that the above relation must be used to obtain an unfair advantage. So, only when it will be proved that not only the relation is of above type but this relation also has been used to gain an unfair advantage from the other party, there will be the proof of undue influence that it will be deemed that the contract is induced by undue influence.

Still the above elements can not provide a clear idea about undue influence as there is no mention as regards 'how will it be deemed that the relation is of the said nature?' that one of the parties can dominate the will of the other party since the power of domination upon another's will is an abstract one. The second paragraph to section 16 makes it clear, providing that—

> In the following cases a person will be deemed to be in a position to dominate the will of another:
>
> i. Where he holds a real authority over the other, e.g., the relation between police officer and the accused.
>
> ii. Where he holds an apparent authority over the other, e.g., the relation between master and servant.
>
> iii. Where he stands in a fiduciary relation to the other. That means the relationship is of utmost good faith, e.g., relation between parents and child, doctor and patient, lawyer and client, teacher and student, etc.
>
> iv. Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

It was observed in *Purnendu Kumar Das Vs. Hiran Kumar Das*[1] that ' The fact that since the agreement was entered when there was a case under section 406 of the Penal Code,

[1] (1969) 21 DLR 918.

1860 we are of the view that this is sufficient ground for holding that there was coercion and undue influence exercised on the defendant.'

In *Bindu Mukhi Vs. Sm. Sarda Sundari*[2] the Court observed—

> 'In order to determine the question of onus in a case attracted by section 16(3) of the Contract Act the first thing to be considered is the relationship between the parties, that is to say, whether one party was in a position to dominate over the other and then it must be proved that position was used to obtain an unfair advantage and even though the transaction may be unconscionable, relief can not be granted until the initial fact of the position to dominate the will is established. If such position is proved and the transaction also appears to be unconscionable, the burden of proof that the contract was not induced by undue influence lies on the person in a position to dominate the will of the other.'

Presumption of undue influence and the burden of proof

The general principle is that he who claims anything must prove it. Onus of the plea that the lender was not only in a position to dominate over the borrower but actually did so, is on the borrower.[3] So, if someone claims that his consent is caused by undue influence then he must prove the fact. But, clause 3 to section 16 provides an exception to this general rule of burden of proof in which case burden of proof will be shifted that the burden of proving that such contract was not induced by undue influence shall lie upon the person who is in a position to dominate the will of the other, that means in this case in fact the undue influence will be

---

[2] (1954) 6 DLR 97.
[3] Mohan Bashi Saha Vs. United Industrial Bank. (1968) 20 DLR 9.

presumed by the law. The burden will be shifted as such subject to the satisfaction two conditions:

1. The person who is in a position to dominate the will of another, enters into a contract with him.

2. The transaction appears, on the face of it or on the evidence adduced, to be unconscionable. This condition is essential for shifting the burden of proof on the person who was in a dominating position; otherwise the actual use of that possibility must be proved as a fact.[1] That means in the absence of this condition undue influence will not be presumed and consequently the burden of proof will not be shifted.

The key term of this condition is 'unconscionable' that the transaction must be 'unconscionable' and it may appear in either of the two ways—

i. On the face of it; or

ii. On the evidence adduced.

That means this 'unconscionable' will appear on the face of it or it will be proved by producing the relevant evidence. Thus, if the above two conditions are satisfied then there will be the presumption that undue influence has taken place and consequently the person who was in a position to dominate the will of the other must prove that he did not use his position and have not gained an unfair advantage as such from the other party.

The Court in *Bindu Mukhi Vs. Sm. Sarda Sundari*[2] observed that—

---

[1] Poosathurai Vs. Kannappa Chettiar (1919) L.R. 47 I.A. 1, 43 Mad. 546.

[2] (1954) 6 DLR 97.

> 'The burden of proof lies in the first instance on the party who raises the plea of undue influence. If that party proves that the other party was not only in a position to dominate his will, but that the transaction entered into was also unconscionable, then the burden of proof, that he did not use his dominant position to obtain an unfair advantage over the other is shifted on to him.
>
> ... ... When there is evidence of overpowering influence and the transaction is immoderate and irrational, proof of undue influence is complete. It is not necessary that such overpowering influence should be by threat or by committing any act forbidden by law or by unlawful detention, etc. If a person has some influence over another person and by means of that influence reduces the will of that person to his subjection, whatever may be the nature of the influence—spiritual, moral, social or any other influence, then it is such coercion as is sufficient to constitute undue influence.
>
> Undue influence usually arises in fiduciary position. But as between strangers between whom there exists no fiduciary relation certain forms of coercion, oppression or compulsion may amount to undue influence invalidating a contract. Undue influence is not a matter always capable of direct proof.'

It was observed in *Abul Hossain Vs. Farooq Sobhan & ors*[3] that—

> 'when the defendant No.1 had a dominant position on account of close association with the Martial Law Authority and the bargain obtained by defendant No.1 in the compromise petition was clearly unconscionable because the plaintiff had to give up his rightful claim in the contractual land, the defendant No.1 has to prove that

[3] 4 BLC (AD) 241.

the compromise was not attained by undue influence which he has miserably failed to discharge.'

Effect of undue influence

The effect of undue influence is that the agreement which is induced by undue influence becomes a voidable contract at the option of the party whose consent was so caused. Section 19A says—

> when consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.
>
> Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.

Illustrations

(a) A's son has forged B's name to a promissory note. B, under threat of prosecuting A's son, obtains a bond from A for the amount of the forged note. If B sues on this bond, the Court may set the bond aside.

(b) A, a money-lender, advances Taka 100 to B, an agriculturist, and, by undue influence, induces B to execute a bond for Taka 200 with interest at 6 per cent per month. The Court may set the bond aside, ordering B to repay the Taka 100 with such interest as may seem just.

Fraud

The term 'fraud' has been defined in section 17 of the Contract Act, 1872. Section 17 says-

"Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :

(1) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it.;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

Explanation.- Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself equivalent to speech.

Illustrations

(a) A sells, by auction; to B, a horse which A knows to be unsound, A says nothing to B about the horse's unsoundness. This is not fraud in A.

(b) B is A's daughter and has just come of age. Here, the relation between the parties would make it A's duty to tell B if the horse is unsound.

(c) B says to A "If you do not deny it, I shall assume that the horse is sound". A says nothing. Here A's silence is equivalent to speech.

(d) A and B, being traders, enter upon a contract. A has private information of a change in prices which would effect B's willingness to proceed with the contract. A is not bound to inform B.

Ingredients of fraud

Analyzing the above definition we see that there are two types of elements of fraud:

1. Psychological element.
2. Substantial element.

1. *Psychological element:* It requires that the following act must be done with the intention to deceive another party thereto or his agent, or to induce him to enter into the contract. That means to constitute a fraud there must be the fraudulent intention and as such to cause any person to enter into an agreement. This deceptive intention is the distinguishing factor between fraud and misrepresentation.

2. *Substantial element:* The initial scheme of this section was to enumerate the different types of fraudulent activities and that is evident from first three types of fraud as are mentioned in the section. But later on probably it has been felt that it is never possible to give the list of fraudulent activities and however long that list is that will never cover every kind of fraud. That is why fourth and fifth types have been added to widen the scope of fraudulent activities and as such to ensure that all probable forms of fraud are being covered by the section. First three are the enumeration of three kind of fraudulent acts, the fourth one says that every act fitted to deceive will be deemed as an act capable to constitute

fraud and the fifth one is more wide in this sense that it gives in fact a wide power in the hands of the law that if the law declares any act as fraudulent that will be fraud. So, according to the fifth one however innocent an act is that may constitute a fraud if that is declared merely by the law as fraudulent. To be a fraud any of the following five acts must take place—

i. The suggestion, as to a fact, of that which is not true, by one who does not believe it to be true. That means if a person makes a false statement knowingly to another person it will be fraud.

ii. The active concealment of a fact by one who has the knowledge or belief of the fact. Here two things must be present—one is the concealment and that concealment must be an active one. Active concealment must be distinguished from a passive concealment. It means that the concealment must be done actively. So, if the seller shows a dress keeping it's one corner into his hands where the cloth is defective, then if he does it unknowingly that there is a defect and he is putting the defective area into his hands, it will not be a fraud; but if he does it actively with fraudulent intention there will be a fraud. Secondly, the person who is concealing the fact must have either the actual knowledge of the fact or must have the belief about the fact.

iii. A promise made without any intention to perform it. Of course, this must be proved based on the circumstances of that case. So, if an insolvent person enters into a contract to purchase a car of latest model, it may be proved as a promise made without

any intention to perform it and as such there is a high probability of it to be a fraud.

iv. Any other act fitted to deceive. It has widened the concept of fraud for the purpose of this Act. Because, first three are mentioned in section 17 in fact as instances of fraud, but it is never possible to mention all types of fraud and in fact nobody knows how many types of fraud may be. That is why by this mention law has widened the scope of fraud to include all types of fraud that any act which fitted to deceive the commission of that act, with the above mentioned fraudulent intention, will be fraud.

v. Any other act or omission that the law specially declares as to be fraudulent. That means though an act is not considered to be fitted to be fraud yet if that is declared specially by the law as fraud then that will be fraud. So, if there is any question like this that 'why is it fraud?' the answer will be 'because the law declared is as void'. For example, the seller of an immovable property is required by section 55 of the Transfer of Property Act, 1882 (Act IV of 1882) to disclose to the buyer any material defect relating to that immovable property, and if no such disclosure is made then this non-disclosure shall amount to be a fraud.

Does mere silence amount to fraud?

The general principle is that mere silence does not amount to fraud. According to the 'explanation' to section 17 it appears that silence amounts to fraud only in the following two circumstances:

i. If the silence is in breach of duty. That means considering the nature and circumstances of the transaction if it appears that it was the duty of that person to speak but he remains silent then such silence shall amount to fraud.

ii. If the silence is equal to speak fraudulent statement. Suppose, a buyer asks the seller indicating a Intel Pentium II computer 'it is a Intel Pentium III computer, is not it?' and the seller remains silent—this silence amounts to fraud.

Misrepresentation

Misrepresentation is defined in section 18 of the Act. It says:

> "Misrepresentation" means and includes: -
>
> (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
>
> (2) any breach of duty which, without an intent to deceive, gains and advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him;
>
> (3) causing, however innocently, a party to an agreement to make a mistake as to the substances of the thing which is the subject of the agreement.

Types of Misrepresentation:

Section 18 speaks of the following three types of acts as misrepresentation:

(1) *Unwarranted false statement*: If a person positively asserts (meaning of positive assertion is an absolute and explicit statement of a fact) that a fact is true and he believes it to be true when his information does not warrant it to be so. A statement is said to be warranted by the information of the person making it when he receives the information from a trustworthy source[1]. According to section 18(1), a positive assertion to be a misrepresentation must fulfill two conditions—firstly, it must be in a manner not warranted by the information of the person making it, and, secondly, the statement is not true though the person making it believes it to be true. Simply speaking, in contrast with fraud, if some one makes any false statement considering it as true then it will be a misrepresentation.

(2) *Breach of duty*: If there is any breach of duty in consequence of which another party is misled but this breach was done without any intention to deceive then it will be a misrepresentation. Some compared it with equitable rule of constructive fraud. In the case of a contract of insurance the policy holder requires the total disclosure and here non disclosure of any material fact which likely to affect the willingness of the other party if done without an intent to deceive may amount to misrepresentation being covered by this category.

(3) *Causing mistake as to the subject matter*: Causing however innocently a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement. In other words, if some

[1] Singh, Avter, *An Introduction to the Law of Contract*, 2nd ed., p.95.

one does anything in consequence of which another person makes mistake as to the subject of the agreement and it is done by that person in fact innocently then it shall amount to misrepresentation.

Effect of coercion, misrepresentation and fraud

The relevant laws have been laid down in section 19 which says—

When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception.- If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.- A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

Illustrations

(a) A, [illegible] to deceive B, falsely represents that 500 [illegible] of indigo are made annually at A's factory, [illegible] by inducing B to buy the factory. The contract is voidable at the option of B.

(b) A, by a misrepresentation, leads B erroneously to believe that 500 maunds of indigo are made annually at A's factory. B examines the accounts of the factory, which shows that only 400 maunds of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation.

(c) A fraudulently informs B that A's estate is free from encumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid the contract, or may insist on its being carried out, and the mortgage-debt redeemed.

(d) B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an under-value. The contract is voidable at the option of A.

(e) A is entitled to succeed to an estate at the death of B; B dies; C, having received intelligence of B's death, prevents the intelligence reaching A, and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A.

Thus, the effect of coercion, fraud and misrepresentation is that the agreement becomes a voidable contract whose validity depends upon the option of the party whose consent is so caused as appears from section 19:

> When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

Additional option in case of fraud and misrepresentation

The law gives an additional option in case of fraud and misrepresentation to the person whose consent is so caused

that he can insist the contract to be performed putting him in the position in which he would have been if the representations made had been true as appears from section 19:

> A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Thus, if the seller enters into a contract to sell one fan to a customer representing it as '*Millat* Fan' either fraudulently or innocently which in fact is a 'National fan' then the buyer considering the contract as voidable may exercise another option that he may insist the seller to perform the contract by selling a real '*Millat* Fan' to him.

Conditions to be fulfilled to make a contract voidable on the ground of misrepresentation and fraud :

Section 19 of the Act adding two explanations to it specifically made it clear that to make a contract voidable on the ground of fraud and misrepresentation two conditions must be satisfied:

First condition is imposed by the first explanation to section 19:

> If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Thus, this specific condition in fact emphasized on the diligence to be applied by the person whose consent is so

caused that if the fraud or misrepresentation would discovered by the application of ordinary prudence and diligence which the concerned party did not do recklessly the law will not further help him by making the contract voidable in his favor.

Second condition is imposed by another explanation added to it which is about the consent to be caused by fraud and misrepresentation. Accordingly, the contract will not be voidable if the consent was not in fact caused by the said fraud and misrepresentation. In other words, there must be a logical casual relation of sequence between the consent and fraud or misrepresentation. Explanation to section 19 says:

> A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practiced, or to whom such misrepresentation was made, does not render a contract voidable.

Thus, it appears that the mere commission of fraud or misrepresentation by one of the parties to a contract does not make it a voidable contract rather to make it voidable on these particular grounds the above two specific conditions also must be satisfied.

Special condition to be fulfilled to make a contract voidable on the ground of misrepresentation or silence amounting to fraud : doctrine of 'caveate emptor'

Even on fulfillment of above conditions a contract will not be voidable if the consent is caused by misrepresentation or silence amounting to fraud within the meaning of section 17 of the Act if another additional condition is not fulfilled, that is, it must be proved that the other party could not discover the truth by his ordinary diligence. So, in these two specific

cases, to make the contract voidable, the buyer also must play an active role in discovering the truth misrepresented or fraudulently presented by silence. Thus, if the buyer negligently does not care about discovering the truth which could be discovered applying the prudence of a reasonable person then he can not subsequently claim the benefit of making the contract voidable though his consent has been proved to be so caused. It reflects the policy of the law to assist a vigilant person, not a dormant careless one. It is worth mentioning here that the law requires the application of reasonable degree of prudence of a reasonable person and it does not require the application of the standard of an angel or super human being of extra ordinary merit.

But this test of application of ordinary prudence to discover the truth is not applicable in case of general fraud. In such cases, the buyers ability to discover the truth and its application thereby is absolutely immaterial, this is because may be for the reason that law should be rigidly applicable in cases of clear fraud.

The above condition is nothing but the embodiment of common law principle of 'buyer be aware' which comes from Roman origin *'caveate emptor'*. The theme of this common law principle is that the buyer should take reasonable care in the transaction and must be vigilant about his rights and quality and genuineness of the product. Otherwise he can not afterwards claim to set aside the contract on the ground of misrepresentation made by the other party which he could discover by application of his ordinary prudence and diligence. It in fact imposes upon the buyer also a duty of care about his own matters of interest.

Mistake

The relevant laws have been laid down in sections 20-22 which are as follows—

Section 20 says—

> Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.
>
> *Explanation.*- An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.
>
> *Illustrations*
>
> (a) A agrees to sell to B a specific cargo of goods supposed to be on its way from England to Chittagong. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away, and the goods lost. Neither party was aware of these facts. The agreement is void.
>
> (b) A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.
>
> (c) A, being entitled to an estate for the life of B, agrees to sell it to C. B, was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

Section 21 says—

> A contract is not voidable because it was caused by a mistake as to any law in force in Bangladesh; but a mistake as to a law not in force in Bangladesh has the same effect as a mistake of fact.

Illustration

A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Law of Limitation. The contract is not voidable.

Section 22 says—

A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

Different types of mistake:

First of all, let us classify different types of mistakes and then will consider the legal impact of each if that causes any consent to an agreement.

From the dimension of the nature of the mistake it may be of two types:

i. Mistake of fact; and

ii. Mistake of law.

Again from the dimension of the person who is committing it, mistake may be of two types:

i. Unilateral mistake; and

ii. Bilateral mistake.

Mistake of fact: The mistake which is related with facts of the agreement and not of law that is called mistake of fact. But an additional explanation of the term mistake of fact has been added by section 20 which says that an erroneous opinion regarding the value of the thing which forms the subject matter of the agreement is not a mistake of fact. Thus it appears from this explanation that even though the

erroneous opinion regarding the subject matter of the agreement seems to be a mistake of fact but it has been negatived to be so by the statute.

Mistake of law: the mistake which is related with the law is called mistake of law and section 21 makes it clear that such law must be among the laws which are enforceable in Bangladesh. This section adds another explanation of the law which says that the mistake of any foreign law will be treated like the mistake of fact for this purpose. Thus if any mistake of foreign law occurs then the rules relating to mistake of fact will come into operation.

Unilateral mistake: If only one party to an agreement is under a mistake, but not the other or others, it is called unilateral mistake.

Bilateral mistake: If both the parties to an agreement are under a common mistake, that is termed bilateral mistake.

Legal consequence of mistake:

Mere causing the consent by mistake does not invalidate the agreement. Legal consequences of each type of mistakes, if that causes the consent to an agreement, are given below:

Nature of the mistake	*Legal consequence*
Bilateral mistake of fact	Agreement becomes void.
Unilateral mistake of fact	Contract does not become voidable.
Bilateral mistake of law	Contract does not become voidable.
Unilateral mistake of fact	Contract does not become voidable.

On the ground of absence of free consent for its being caused by mistake the agreement becomes void on

fulfillment of the following three conditions as mentioned in section 20 of the Contract Act, 1872, which are as follows:

i. The mistake must be bilateral. So a mere mistake done by one of the parties shall not invalidate the agreement.
ii. The mistake must be of fact.
iii. The mistaken fact must be essential to the subject matter of the agreement. So, if any tiny bilateral mistake of fact occurs the agreement will not be void.

This is the only instance of invalidating of an agreement on the ground of its consent being caused by mistake on fulfillment of above three specific conditions. In case of every other mistake even if that causes the consent the validity of the agreement will not be affected adversely. When a contract was entered into between the parties on a mistake of fact, that contract cannot be binding on the parties in view of provisions of section 20 of the Contract Act[1]. It was observed in *S. S Fazli Vs. M/s Star Film Distributor* that—

> 'If there was no misrepresentation and both parties had been laboring under a misapprehension that the contract had been cancelled, the abandonment due to a mutual mistake, would not affect the plaintiff's rights. Under section 20 an agreement based on a mutual mistake is void and same principle will apply to an abandonment of a right under a contract.'[2]

[1] Baka Gopal Basak Vs. Kafiluddin Chowdhury, (1959) 11 DLR 125.
[2] (1964) 16 DLR (SC) 198.

CHAPTER 5

CONSIDERATION

Consideration is one of the essential elements of a contract. The general principle is that 'no consideration no contract'. But there are certain exceptions to this general principle where there may be contracts even without consideration.

Meaning of consideration

In ordinary sense, consideration means the exchange price. It has a different legal meaning which does not restrict it only within the area of monetary compensation rather this term has been given a wider legal connotation. The concept 'consideration' has been defined in section 2(d) of the Contract Act, 1872. It says:

> When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise.

Analyzing the above-mentioned definition of 'consideration' we get the following ingredients of consideration:

i. It is an act or abstinence. That means it may be positive or negative.

ii. It is done at the desire of the promisor. So, if it is done at the desire of any third person that will not be

a consideration. Conversely, if anything is done at the desire of the promisor, then that will be a good consideration irrespective of the nature of the thing done, even that may be legal or illegal, adequate or inadequate.

iii. It may be of three forms, i.e. has been done, or is being done or is promised to be done at some future time.

Essence of consideration

According to the definition to be a consideration it is required that something is to be done, forborne, or promised at the desire of the promisor. It is worth mentioning here that consideration is not restricted only within monetary compensation. Consideration even may be termed as a burden discharged. In other words it can be explained as 'suffering' in the sense of loosing something, may be that is one's energy, service, money or anything. In fact, it is wonderfully defined in famous English case *Currie Vs. Misa*[1]:

> A valuable consideration in the sense of law may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.

Justice Patteson's observation is also remarkable here:

> Consideration means something which is of value in the eye of the law, moving from the plaintiff: it may be some detriment to the plaintiff or some benefit to the defendant.[2]

A paragraph from the book 'Law of Contract'[3] written by *Professor Treitel* is worth mentioning here—

---

[1] (1875) LR 10 Exch 153.
[2] Thomas Vs. Thomas (1842) 2 QB 851.
[3] 10th edn, Sweet & Maxwell, 1999, at p. 64.

> The traditional definition of consideration concentrates on the requirement that 'something of value' must be given and accordingly states that consideration is either some detriment to the promisee (in that he may give value) or some benefit to the promisor (in that he may receive value). Usually, this detriment and benefit are merely the same thing looked at from different points of view. Thus payment by a buyer is consideration for the seller's promise to deliver and can be described as a detriment to the buyer or as a benefit to the seller; and conversely delivery by a seller is consideration for the buyer's promise to pay and can be described either as a detriment to the seller or as a benefit to the buyer. These statements relate to the consideration *for the promise of each party* looked at separately. For example, the seller suffers a 'detriment' when he delivers the goods and this enables him to enforce the buyer's promise to pay the price. It is quite irrelevant that the seller has made a good bargain and so gets a benefit from the performance of the contract. What the law is concerned with is the consideration *for a promise*—not the consideration *for a contract*.

Justice Patteson[1] observed that—

> 'The consideration is, that the plaintiff, at the defendant's request, had consented to allow the defendant to weigh the boilers. I suppose the defendant thought he had some benefit; at any rate, there is a detriment to the plaintiff from his parting with the possession for even so short a time.'

Consideration may move from the promisee or any other person

It appears from the clear language used in the definition of consideration that there is no such requirement that a

[1] Bainbridge Vs. Firmstone (1838) 8 A & E 743, at p. 744.

consideration must move from promisee, rather it may be furnished by the promisee or any other person and as such only material thing to be considered is that whether there is any consideration or not. So, a promise is enforceable if there exists any consideration and it is immaterial that by whom the consideration has been furnished. Thus in *Chinaya Vs. Ramaya*[2]:

> An old lady, by deed of gift, made over certain landed property to the defendant, her daughter. By the terms of the deed, which was registered, it was stipulated that an annuity of Rs. 653 should be paid every year to the plaintiff, who was the sister of the old woman. The defendant on the same day executed in plaintiff's favour an *ekrarnama* (agreement) promising to give effect to the stipulation. The annuity was, however, not paid and the plaintiff sued to recover it.

The promise was held to be enforceable though here the defendant's promise was given to the plaintiff and the consideration was furnished by the plaintiff's sister.

Types of consideration

Consideration may be of three types as it appears clearly from the language used to define the term 'consideration'— *has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing*. So, we get the following considerations:

1) Executory consideration;

2) Executed consideration;

3) Past consideration.

---

[2] (1882) 4 Mad 137; 6 Ind Jur 402.

1) Executory consideration: Executory consideration consists of a promise to do or to abstain from doing something at a future time. In such case, the liability becomes outstanding on both the sides and in fact most of the business contracts take place in this way. Suppose, A agrees to sell a car and B agrees to buy it at a certain price, here the consideration is executory.

2) Executed consideration: If one of the parties thereby performs his part and the liability on another's part remains outstanding, the performance of the earlier person is an executed consideration. In other words, if any party to a contract performs his part and the other party keeps it for future time then the part which is performed already will be called executed consideration. Suppose, A agrees to sell his computer for Tk. 30,000, B agrees and pays the amount stated to A but still A has not delivered the car, then the payment made By B will be considered as an executed consideration.

3) Past consideration: By using the words 'has done or abstained from doing' in section 2(d), the law clearly recognized past consideration as a good consideration, though it is not generally recognized as consideration in English Law. If the service is rendered in the past at the request or desire of the promisor the subsequent promise is regarded as an admission that the past consideration was not gratuitous and which is evidence of the amount of the reasonable remuneration on the faith of which the services were rendered[1]. Thus, in *Sindha Vs. Abraham*[2], the plaintiff rendered services to the defendant at his desire during his minority and

[1] Re Casey's Patents (1892) 1 ch. 104, 115, per Bowen, L.J.
[2] (1859) 20 Bom. 755; cf. (1918) 20 Bom. L.R. 441.

continued those services at his request after his majority and this was held to be a good consideration for a subsequent express promise by the defendant to pay an annuity to the plaintiff, but it was admitted that if the services had not been rendered at the desire of the defendant the case would have fallen within section 25 of the Act.[3] According to section 2(d), the act should be done at the desire of the pomisor. A past consideration should be distinguished from an executed consideration. An executed consideration is done in response to a positive promise, whereas the case of past consideration is not so.

Consideration: an essential element of a contract

Section 25 lays down the general principle regarding the requirement of consideration to form a contract in this way that—'an agreement made without consideration is void'. From here the rule has sprung that if there is no consideration there is no contract.

Exceptions to the general principle: contracts without consideration

Section 25 of the Contract Act, 1872, also speaks of exceptions to the general principle where there may be valid agreements without consideration. In the following three circumstances there can be valid agreements without consideration:

1) Agreement made out of natural love and affection: Section 25(1) while laying down the first exception says that—

> it is expressed in writing and registered under the law for the time being in force for the registration of documents

[3] Mulla, *The Indian Contract Act*, 10th ed., p.11.

and is made on account of natural love and affection between parties standing in a near relation to each other;

So, it appears that first exception requires to satisfy three conditions. They are as follows:

i. The parties stand in a near relation to each other and the agreement is made out of natural love and affection. It may be one between father and son, mother and son, husband and wife and likewise. One thing should be emphasized here that mere nature of the subsisting relationship that they are nearly connected with each other and existing of natural love or affection are not sufficient to enjoy the privilege of this sub-section rather it must be proved that that particular agreement was made out of that natural love and affection. So, even if there is an agreement between father and son where the relationship is one of natural love and affection but the agreement was made at the hit of anger not on account of love and affection that agreement shall not be enforceable without consideration because of non-fulfillment of the requirements imposed by law in this regard.

ii. It is written.

iii. It is registered .

2) The second exception is mentioned in section 25(2) which is about to compensate past voluntary service. Section 25(2) says:

> It is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do;

Two types of promises are covered by this exception:

i. To compensate wholly or in part a person who has already voluntarily done something for the promisor. Suppose, A finds the lost dog of B and then B promises to give A Tk. 1000, the promise made is enforceable by law without consideration.

ii. To compensate wholly or in part a person who has already voluntarily done something for the promisor which he was legally compellable to do. Suppose, if A pays the gas bill of B and then B's subsequent promise to compensate A is enforceable without any consideration.

So, we see that a past voluntary service has been considered as a good consideration under section 25(2). It is immaterial whether that was a mere voluntary act or voluntarily doing something which, in fact, the promisor was legally bound to perform. One thing must be mentioned here that if something is done at past at the request of the promisor then it comes within the definition of section 2(d) as past consideration. But here the act done voluntarily is covered by it. This was not done at the request of the promisor, because then there would not arise of being covered by exception as that would be covered by the definition of consideration itself.

3) Third exception is about the promise regarding the payment of time barred debt. Section 25(3) lays down that:

> it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

Following conditions must be satisfied to enjoy the privilege of a contract without consideration according to the above mentioned sub-section, these are:

i. The promise must be about payment of time-barred debt. So, if there is any claim which is barred by the law of limitation for the time being in force, then the subsequent promise made to pay the debt is enforceable without consideration if the next condition is satisfied.

ii. It should be written and signed.

It was held in *Daulat Ltd. Vs. Pubali Bank*[1] that such a document must also be properly stamped. An unconditional promise in writing and signed by the party to pay on demand a time-barred debt though not a fresh transaction comes under Article 49 of Schedule to the Stamp Act, 1899 (Act No. II of 1899) and hence will require requisite stamp.[2]

An unconditional promise to pay a time-barred debt in writing duly signed does not come under section 19 of the Limitation Act, 1908 (Act No. IX of 1908) if it is not made before the expiration of the period of limitation. ... It directly comes under section 25(3) of the Contract Act.[3] It was held in *Riasatulla Vs. The Tripura Modern Bank Ltd.*[4] that when a promise is expressed in writing with signature from which a contract to pay a time barred debt can be spelled out, it amounts to a contract within section 25(3) of the Contract Act. The Court observed in *Tripura Modern Bank Ltd. Vs. Elahi Baksha*[5] that—

---

[1] 39 DLR 243.
[2] *Ibid.*
[3] *Ibid.*
[4] (1968) 20 DLR 44.
[5] (1966) 18 DLR 498.

while an acknowledgement under section 19 of the Limitation Act is required to be made before the period of limitation prescribed has expired, a promise under section 25(3) of the Contract Act may be made after the period of limitation.

The letter in the present case which contains the phrase (I sign below acknowledging the debt up to date) clearly indicates a promise to pay so as to operate as a promise within the meaning of section 25(3) of the Contract Act.

Unqualified acknowledgement made by the debtor is by itself a promise to pay. Therefore, the expression used in the letter referred to above is an agreement as contemplated by section 25(3) of the Contract Act and gives a fresh starting point of limitation to the Bank for realization of the debt specified in the said letter.

Adequacy of consideration

The word 'something' used in the definition of 'consideration' in section 2(d) of the Contract Act implies an important principle regarding consideration that it may be anything. It is immaterial whether that is sufficient or not. The definition says:

> When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise.

Here *something* means anything which has any value in the eye of law. It implies that consideration need not be adequate, because it is not mentioned in the law that consideration must be sufficient rather *'something'* which requires the existence of consideration in any form. In other words, it is required by law that consideration must exist in reality whether that is sufficient and adequate compensation in exchange of the promise or grossly inadequate against the

promise made. Hence there is a popular conclusion that consideration must be real, it need not be adequate.

So, the only point is that whether anything is done at the desire of the promisor? If so, then that will be sufficient to constitute a consideration as required by law for the formation of valid contract irrespective of the gravity, quality, quantity or inadequacy of the thing so done. The observation made by *Peter Gibson LJ* in a recent English case[1] is worth mentioning here—

> On the second point, the consideration moving from the plaintiff, (counsel for the defendant) submitted that in reality there was no consideration provided by the plaintiff. The plaintiff was expressing himself to be ready, willing and able to proceed to exchange contracts, which was, he submitted, simply what he would have to do in any case. Further, he said that the judge rightly described the threat by the plaintiff to issue an injunction as vapid, that is to say of no substance. He accordingly submitted that there was nothing by way of valuable consideration which the defendant received. I cannot accept these submissions either. I accept that the threat of an injunction only had a nuisance value in that I cannot see how the plaintiff could have succeeded in any claim. Nevertheless, that nuisance was something which the defendant was freed from by the plaintiff agreeing to the lock out agreement. Further, the threat of causing trouble with Miss Buckle was again a matter which could have been a nuisance to the defendant and again removal of that threat provided some consideration. But I also believe that the promise by the plaintiff to get on by limiting himself to just two weeks if he was to exchange contracts was of some value to the defendant. The defendant had the benefit of knowing that if it chose to give the plaintiff a draft contract to agree, there would be no delay on the

[1] Pitt Vs. PHH Asset Management Ltd. (1994) 1 WLR 327, at p. 332.

> plaintiff's part beyond a maximum of two weeks thereafter. The judge held that these three items constituted valuable consideration sufficient to support the lock out agreement and I respectfully agree with him.

If the parties agree for a transaction with inadequate consideration then the law is not to interfere in it. Because, the amount of consideration is a matter to be decided by the parties to a contract. The law will examine only whether there is any consideration or not. The parties will bargain and at one stage they will be agreed and as such the Court or the law must not interfere in this freedom of transaction. But the Court will examine side by side whether the consent is given freely or not. Once it is seen that the consent is given freely then the Court will not take the matter of inadequacy of consideration into consideration. In other words, if any party freely consents to do something with grossly inadequate consideration, the law will not prohibit him. But if the court sees that the consideration is inadequate then the court may be suspicious about free consent that whether the consent was given freely or not. This provision of law is embodied in the explanation II to section 25, which spells out as follows:

> An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

So, the explanation makes it clear that if consent is given freely then the agreement will not be void merely because the consideration is inadequate. But the Court may take into account the amount of consideration to determine the question whether the consent of the promisor was freely given or not.

CHAPTER 6

LEGALITY OF OBJECT AND CONSIDERATION

It is one of the essential elements of a valid contract that the object and consideration of an agreement must be lawful. Thus there may be an agreement with an illegal consideration or object, but not a contract. To constitute a contract both consideration and object of an agreement must be lawful.

Meaning of object and consideration:

Section 2(d) of the Contract Act, 1872, defines the term 'consideration'. It says *'When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise'*. But there is no such statutory definition of the term 'object' and it must be understood from its ordinary legal sense. The term 'object' is different from the word 'consideration' which implies the purpose of any particular act. So, in relation to an agreement the term 'object' means the specific purpose of the agreement. In other words, consideration is something done at the desire of the promisor whereas object is the purpose for which the acts are being done. For instance, there may be an agreement between persons to sale arms for killing some persons unlawfully—here the object of this agreement is to kill some persons unlawfully.

Provisions regarding legality of object and consideration:

Section 10 of the Act requires that to turn an agreement into a contract the consideration and object must be lawful. Section 23 lays down the basic rules regarding the considerations and objects which are lawful. Again, section 24 deals with the illegality of consideration in part. Let us examine the provisions relating to legality of object and consideration:

Which considerations and objects are not lawful?

Section 23 says—

> The consideration or object of an agreement is lawful, unless—
>
> it is forbidden by law; or
>
> is of such nature that, if permitted, it would defeat the provisions of any law; or
>
> is fraudulent; or
>
> involves or implies injury to the person or property of another; or
>
> the court regards it as immoral, or opposed to public policy.
>
> In each of these cases, the consideration or object of an agreement is said to be unlawful.

Illustrations

(a) A agrees to sell his house to B for 10,000 Taka. Here B's promise to pay the sum of 10,000 Taka is the consideration for A's promise to sell the house, and A's promise to sell

the house is the consideration for B's promise to pay the 10,000 Taka. These are lawful considerations.

(b) A promises to pay B 1,000 Taka at the end of six months if C, who owes that sum to B, fails to pay it. B promises to grant time to C accordingly. Here the promise of each party is the consideration for the promise of the other party, and they are lawful considerations.

(c) A promises, for a certain sum paid to him by B, to make good to B the value of his ship if it is wrecked on a certain voyage. Here A's promise is the consideration for B's payment, and B's payment is the consideration for A's promise and these are lawful considerations.

(d) A promises to maintain B's child, and B promises to pay A 1,000 Taka yearly for the purpose. Here the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

(e) A, B and C enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void as its object is unlawful.

(f) A promises to obtain for B, an employment in the public service, and B. promises to pay 1,000 Taka to A. The agreement is void, as the consideration for it is unlawful.

(g) A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment by A, on his principal.

(h) A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

(i) A's estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the

defaulter is prohibited from purchasing the estate. B., upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

(j) A, who is B's *mukhtar*, promises to exercise his influence as such, with B in favour of C, and C promises to pay 1,000 Taka to A. The agreement is void, because it is immoral.

(k) A agrees to let her daughter on hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Penal Code.

So the above section declares the following considerations and objects as unlawful:

Forbidden by law: If the consideration or object is in contravention of any legislative enactment or regulation made by a competent authority that will not be a lawful consideration. The obvious illustrations are the acts forbidden by the Penal Code, 1860. Of course, beside Penal Code, 1860, there are many other laws which also forbid certain acts to be done, those are also covered by this provision. For example, if there is any agreement between A and B to commit a theft and to divide the property so acquired between them equally, that agreement is void, because the object is forbidden by law.

Defeat the provision of any law: It implies that though the act agreed to be done is not a direct violation of law but if that is permitted to be done that would defeat the provision of any law, then such object or consideration will also be unlawful. In such cases, it may defeat the provision of any legislative enactment or any provision of any personal law or of any other law in force in Bangladesh. Thus, if a Muslim

couple enter into an agreement that the wife will live separately after the marriage, the agreement is void, as the agreement is made in violation of Muslim personal law.
It was observed in *Haji Abdullah Khan Vs. Nisar Muhammad Khan*[1] that—

> If under the law there is some condition precedent attached to the validity of a transfer it is open to the parties to enter into an agreement subject to compliance with the condition precedent. The attack on the agreement for sale on the ground of public policy could only succeed if it was shown that the intention of the agreement was to defeat a law. If the parties that enter into an agreement for sale contemplate only a sale with the requisite sanction they are not making any effort to defeat the law.

Fraudulent: If the object or consideration becomes fraudulent then the agreement will be illegal agreement. What is fraudulent that is a question of fact. It may be fraudulent by concealing the material facts or otherwise.

Injury to the person or property of another: Here injury means the violation of one's legal right though there may not have any actual loss or damage. Thus the agreements to break the car of another, or to defame another, or to trespass to another's property, though may not cause actual loss, are void.

It was held in *Hossain Ali Khan Vs. Firoza Begum*[2] that the contract which adversely affects the lawful interests of a third party both in status and in respect of right to property is void. In this case[3]—

---

[1] (1965) 17 DLR (SC) 481.
[2] (1969) 21 DLR 9.
[3] *Ibid.*

The wife brought a suit for setting aside a compromise decree on the ground that it was obtained by fraud and the *solenama* was filed without her knowledge. The defendant husband's case was that compromise was signed by the plaintiff after been aware of its contents and that she receives a sum of Rs. 2,30,000 in consideration of the compromise.

It was stated in the *solenama* that the plaintiff had admitted that the son born to her was not of the defendant and the said son was not entitled to any monthly allowance from the defendant.

The Court of appeal blow on this compromise observed as follows: -

> On the plain meaning of these terms, the boy stands to be illegitimate child and is not entitled to any maintenance from the defendant. Needless to say that these terms do involve injury to the status and property of the minor son. That being the position, the consideration of the *solenama* is void.

Held:

Every agreement unlawful in nature is void. Consequence of the admission by the plaintiff in the present *solenama* which forms part of the decree is that the son will be reduced to the status of an illegitimate son. It clearly involves injury to his status, right to maintenance and also inheritance. That being so, the terms of the contract would come within ambit of section 28. Such an agreement is unlawful and is void.

The Court regards it as immoral or opposed to public policy: This is in fact a wide power given in the hands of the Courts, because what is 'immoral' or 'opposed to public policy' is a mixed question of law and fact, since the statute does not define these terms directly, so the interpretation remains on the discretion of the judges. Moreover, 'morality' is really a variable concept

which is dependant on many factors including the culture of one time. And 'public policy' precisely means public welfare which indicates the ultimate well being of the people at large. It was observed in *Dula Mia Vs. Haji Md. Ebrahim*[1] that—

> Public policy and morality referred to in section 23 of the Contract Act, are by their very nature variable things and always an unsafe and treacherous ground for legal decision. The determination of what is or is not contrary to public policy or morality must necessarily depend upon the merits in each case and upon the stage of development of public opinion and morality of the community concerned as a whole. The Courts are, as such, very cautious in deciding the question and normally reluctant to invent new heads of public policy or to extend it beyond the class of cases already covered by it.
>
> Public policy does not comprehend, as often popularly imagined, all the political policies from time to time of the Government nor does it render void agreements merely because they tend to defeat some purpose ascribed to the law which is neither apparent nor necessarily implied in the language of the enactment.

Thus it is now well settled that the provisions of section 23 of the Contract Act have to be construed strictly and the Court should not invent new categories or new heads of public policy in order to invalidate a contract.[2]

If the contract of lease of a factory was lawful at the time when the lease was executed the fact that the operation of the factory was found as falling within mischief of a statute would not make the lease in its inception opposed to public policy.[3]

---

[1] (1956) 8 DLR 616.

[2] Manzoor Hussain & others Vs. Wali Muhammad & others, (1965) 17 DLR (SC) 369.

[3] Haji Abdul Karim Vs. Sh. Ali Mohr, (1959) 11 DLR (SC) 313.

In *Lal Mia Vs. Abdul Gani*[4] it was decided that it is against public policy to make a trade of felony or attempt to secure benefit by stifling a prosecution or compromising an offence which is not compoundable in law and an agreement to that effect is wholly void. If from the evidence and circumstances it can be inferred that the consideration is referable to the withdrawal of a criminal proceeding the agreement must be held to be void under section 23 of the Contract Act.[5] If, however, there is a *bona fide* civil dispute which the parties have decided to settle and there happened to be subsidiary proceedings in a criminal court, it would be contrary to public policy and to justice and equity to allow any person to escape his legal liabilities on the mere technical ground that there was some understanding that these criminal proceedings too would not be pressed to conclusion.[6]

The Court observed in *Moti Mia Vs. Ayesha Khatun*[7] and another that—

> if for withdrawing and compromising a non-compoundable case an agreement is entered into between the parties then the same is against public policy and the bar of section 23 of the Contract Act is attracted.
>
> By an oblique and indirect reference the object of the agreement cannot be brought within the mischief of section 23 of the Contract Act.
>
> If consideration is for compromising a non-compoundable offence then it is hit by section 23 of the Contract Act as opposed top public policy.

---

[4] (1953) 5 DLR 338.
[5] *Ibid.*
[6] *Ibid.*
[7] (1996) 48 DLR (AD) 64.

It was observed in *Radha Ballav Basak Vs. Krishna Sundari Basak* that—

> In order to determine whether the consideration of a document is prohibited by section 23 of the Contact Act it is to be seen whether the facts are that this contract came into existence, when a criminal prosecution was hanging on the head of the executant or the contract was entered into for the purpose of taking away the prosecution for a non-compoundable offence from the hands of the Crown prosecutor in their own hands. It would be legitimate to infer that in those circumstances, the consideration would be a consideration which is prohibited by section 23.

The Court observed in *Md. Abdul Kasem Vs. Mofizuddin Shah*[1] that—

> It has been contended that since the document was brought into existence during the pendency of a criminal proceeding in which plaintiff was the complainant and defendant was the accused, it is hit by section 23 of the Contract Act as being against public policy, namely the stifling of a criminal prosecution. The most important question in this behalf is, has the criminal case been settled as result of and because of the impugned document? If it is so, it would be hit by the provisions of section 23, if not, it would not come within the mischief of the said section, notwithstanding the fact that it come into existence during the pendency of the criminal proceeding.
>
> The execution of the document at a time when the suit was pending may amount to a strong piece of circumstantial evidence tending to show that the criminal proceeding was compromised as a result thereof, but it is no more than a piece of evidence which may be rebutted. The Court would look to the other evidence and attending circumstances in order to arrive at a finding whether the

[1] (1965) 17 DLR 435.

> execution of the document was the consideration for a compromise of the said criminal proceeding. If the document is merely executed during the pendency of such a criminal proceeding and if it is not the basis of compounding the criminal proceeding, it would not hit by section 23 of the said Act.

If the principal contract is one which is void *ab initio* or comes within the mischief of section 3 of the Contract Act, then the arbitration clauses providing for settlement of dispute between the parties by arbitration will be unenforceable and the award thereon becomes a nullity.[2] Where a person invoking the aid of a court to invalidate a contract on the ground of illegality is himself implicated in the illegality, the court will not, as a rule, assist him.[3] It was held in *Central Bank of India Ltd. Vs. Messrs. Jan Muhammad Haji Ismail*[4] that it is undoubtedly true that the contracting parties may enter into a contract on special terms if they are not contrary to the provisions of section 23 of the Contract Act and they shall be bound by the terms of such agreement, but a party seeking protection under such a special term must first establish that any of the clauses of the said special contract is attracted to the case. The Court decided in *Md. Azam Khan Vs. Akhtarunnessa Begum*[5] that a suit for recovery of property transferred in consideration for an illegal promise would not lie and so also a suit for declaration that a sale deed executed in consideration for an illegal promise will not lie. It was observed by the Court[6]—

> When the parties to a contract are themselves in *pari delicto* neither of them is entitled to ask any relief from a Court of

---

[2] (1965) 17 DLR (SC) 369.
[3] *Ibid.*
[4] (1965) 17 DLR 582 .
[5] (1957) 9 DLR (WP) 19.
[6] *Ibid.*

law. The Court will not come to the aid of either party to retrieve his position. In a case where the illegal purpose has already been executed in whole or in material part, the law leaves both parties to their fate.

Section 65 is not applicable where a contract is void *ab initio* under section 23 or section 25 of the Act.[1] In a Pakistani case[2]—

> An agreement entered into between the appellant and the respondent contained a clause providing that if the respondent attempts to offer bribe to any employee of the appellant, the appellant could confiscate the price of the work done by the respondent even if such attempt occasioned no loss to the appellant. Accordingly, on an allegation that the respondent offered bribe to an engineer the appellant confiscated the price of the work done by the respondent. The trial Court found that the said clause was penal within the meaning of section 74, Contract Act and held that the appellant could have confiscated only a reasonable sum out of the pride of the work completed before the offer of bribe. On appeal to the High Court, the Court
>
> *Held:*
>
> (a) The clause providing that the price of the work done by the contractor may be confiscated even if no loss was occasioned was violative of section 73, Contract Act and void under section 23 but section 74 which dealt with breach of valid contract had no application to the present agreement which was void *ab initio;*
>
> (b) that the clause in question conferred on the appellant jurisdiction to punish the offence of bribe and that the appellant could not assume that jurisdiction unless

[1] P. K. Basak Co. Vs. Gossen & Co., (1960) 9 DLR 1.
[2] PLR (1960) 2 WP 602.

empowered by the legislature subject to the condition that state was a party to the proceedings;

(c) that the clause was also exceptionable because it subjected the respondent to double penalty, that is, confiscation of price of the work done and prosecution in the criminal court.

It was held in *Purnendu Kumar Das Vs. Hiran Kumar Das*[3] that a contract is hit by section 23 of the Contract Act when consideration or object of an agreement is unlawful. In this case[4]—

> The plaintiff had initiated three criminal proceedings of which one was under section 406 P.P.C. against his brother the defendant, and when these proceedings ere pending before the Magistrate, the said Magistrate suggested a compromise between the brothers as result of which the defendant after 4 days executed a *bainapatra* in favor of the plaintiff to sell to him the suit properties and on that very date proceeding under section 406 was dismissed for non-prosecution. When a suit for specific performance of contract was filed by the plaintiff, it was held:
>
> > The very fact that a case was initiated by the plaintiff under section 406 of Pakistan Penal Code goes to show that the defendant was in a very difficult position when the learned Magistrate was dealing with three cases and was suggesting compromise and as it appears that term of agreement were settled on 25.4.55 and the case under section 406 Pakistan Penal Code remained pending till 30.4.55 when the parties entered into

[3] (1969) 21 DLR 918.
[4] *Ibid.*

> the agreement and an order was passed in the proceeding in these terms: "The complainant does not proceed, dismissed under section 203 Criminal Procedure Code." We are of the view that this is sufficient to hold that this contract is hit by section 23 of the Contract Act as the consideration or object of the agreement is unlawful.[1]

It was observed by the Court of Appeal in *Irfan Sayed (Md) Vs. Rukshana Matin*[2] and others that—

> The phrase "equity and good conscience" is not in Order VII rule 11 of the Code of Civil Procedure and as such the learned single Judge wrongly imported this concept to that provision of the Code which he was not permitted to do and there is no reasoning as to how the agreement is void as opposed to Public Policy under section 23 of the Contract Act and as to why the suit ought to have been filed in the family Court when there was no issue as to guardianship and custody of the child and as such, the judgment suffers from irrelevant and rambling exercises bereft of legal acumen and hence the same is set aside.

Legal consequences of agreements where considerations and objects are unlawful in part: Section 24 says—

> If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object is unlawful, the agreement is void.

---

[1] *Ibid.*

[2] 1 BLC (AD) 67.

Illustration

A promises to superintend, on behalf of B, a legal manufacture of indigo, and an illegal traffic in other articles. B promises to pay to A a salary of 10,000 Taka a year. The agreement is void, the object of A's promise and the consideration for B's promise being in part unlawful.

Thus, the laws enumerated in the above section may be projected through the following table:

Nature / number of consideration	*Nature / number of object*	*Legal consequence*
Any part of a **single** consideration is **unlawful**	For one or more objects	The agreement is void.
Any one or any part of any one of **several** considerations is **unlawful**	For a single object.	The agreement is void.

CHAPTER 7

VOID AGREEMENTS

A contract starts its formation with the proposal at its first phase, which ultimately turns out as an agreement passing through the stage of promise. That agreement then will reach to its final destination, i.e., may be turned into a contract if it can satisfy the requirements of a contract. But if it fails to satisfy the legal requirements to be a contract then that becomes nothing but unenforceable by law which cannot turn into a contract ever.

What is void agreement?

Section 2(g) of the Contract Act, 1872, says that "an agreement not enforceable by law is said to be void". So the law is very much simple on this point which states that an agreement is void if it is not enforceable by law. As such we get two elements of a void agreement:

i. There is an agreement, and

ii. it is not enforceable by law.

There must have been an agreement for the first time and a mere promise which has not been turned into an agreement can not be termed as void agreement though that does not become enforceable by law. Then the sole test for an agreement to be declared as void is that whether that is

enforceable by law or not. If not then will be termed as void agreement.

Meaning of 'enforceable by law':

It is worth mentioning here that the law has not kept the term 'enforceable by law' undefined to be interpreted at discretion, rather the reading of sections 2(h), 2(g) and 10 together gives a clear answer to the question that 'when will an agreement be enforceable by law' or 'what are the conditions to be satisfied by an agreement to be enforceable by law' or 'when can an agreement be termed as not enforceable by law'.

Section 2(h) states that 'an agreement enforceable by law is a contract'. Section 10 lays down that—

> All agreements are contracts if they are made by the free consent of parties competent to contract for a lawful consideration and with a lawful object and are not hereby expressly declared to be void.

An agreement which is a contract that is, of course, enforceable by law and since section 10 lays down the agreements which are contracts, this in fact says when does an agreement become enforceable by law, and accordingly we get the answer that to be enforceable by law, i.e., to be a contract, an agreement must fulfill the following conditions:

i. The parties must be competent;
ii. There must have free consent of parties;
iii. Lawful consideration must be there;
iv. The object of the agreement must be lawful; and

v. The agreement is not expressly declared void by law. Section 10 is nothing but a proper explanation to sections 2(g) and 2(h) that explains the phrase 'enforceable by law'. If an agreement satisfies the above five conditions then it will be enforceable by law and consequentially be termed as a contract. So, if an agreement does not satisfy any of these five conditions, it will not be enforceable by law and an agreement not enforceable by law is said to be void[1]. So there may be an agreement by the incompetent parties without free consent and it is immaterial whether the consideration or object is lawful or not, but obviously that can never turn into a contract rather it will be termed as void agreement. So, according to the indication given by section 10, there may be five types of void agreements. The following agreements are void in which—

i. any of the parties is incompetent to enter into an agreement, or

ii. free consent is absent, or

iii. consideration is not lawful, or

iv. the object is not lawful.

v. Apart from the above mentioned four reasons there are certain other agreements which are void because the law declares them expressly as void. And it is mentioned clearly that the last type of void agreement is that agreement which is expressly declared void by the law.

First four types of void agreements have already been discussed in the preceding chapters, which need not have any further discussion, these are:

[1] Section 2(g), the Contract Act, 1872.

i. If the parties to an agreement are not competent that will be void (sections 10, 11, 12 and *Muhuri Bibi Vs. Dharamadas Ghose* [2]).

ii. Consent may not be termed as 'free' as is required by section 10 for various reasons[3]. Every agreement in which the consent is not given freely cannot be termed as void. Rather in most of such cases it becomes voidable[4] one and on this ground an agreement becomes void only in one circumstance where the consent of an agreement is caused by bilateral mistake of fact essential to the agreement (section 20).

iii. Every agreement of which the object or consideration is unlawful is void.[5]

iv. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.[6]

The discussion about the last type of void agreement will be the main concern of this Chapter. Section 10 lays down that—

'all agreements are contracts if ... ... and *are not hereby expressly declared to be void*'.

This particular condition implies three things:

i. If an agreement falls within the category of expressly declared void agreements then it will not be a contract.

---

[2] (1903) 30 1A 114; 30 Cal 539.
[3] *See* section 14, the Contract Act, 1872.
[4] *See* sections 19,19A, the Contract Act, 1872.
[5] *See* section 23, the Contract Act, 1872.
[6] *See* section 24, the Contract Act, 1872.

ii. So, obviously there are certain agreements which are expressly declared to be void.

iii. The term 'hereby' used by section 10 implies to mean the express declaration of void made by this law, i.e., the Contract Act ,1872.

Different types of void agreements:

So, it can be concluded that there are certain agreements which have been expressly declared as void by the Contract Act, 1872. These are the following:

1. Agreement made without consideration (section 25).
2. Agreement in restraint of marriage (section 26).
3. Agreement in restraint of trade (section 27).
4. Agreements in restraint of legal proceedings (section 28).
5. Agreements the meaning of which uncertain (section 29).
6. Agreements by way of wager (section 30).
7. Agreements contingent on impossible events (section 36).
8. Agreements to do impossible acts (section 56).

Agreement made without consideration

An elaborate discussion has been made in chapter 5 about it.

Agreement in restraint of marriage

Section 26 lays down that—

> every agreement in restraint of the marriage of any person other than a minor, is void.

Thus the section prohibits every type of restriction whether total or partial or of any type. The language used in this section is wide enough so as to declare every type of agreement in restraint of marriage as void other than the marriage of a minor. This unguarded restriction may create certain practical anomalies with some other laws.

Under Islamic Law, the wife enjoys a limited power to divorce her husband and accordingly the wife may divorce her husband by an exercise of her delegated power of divorce which may be given as conditional upon the 2nd marriage of the husband though Islamic law permits polygamy. It would seem, therefore, that a provision in a *Kabinnamah* by which a Muslim husband authorises his wife to divorce herself from him in the event of his marrying a second wife is not void, and if the wife divorces herself from the husband on his marrying a second wife, the divorce is valid, and she is entitled to maintenance from him for the period of *iddah*.[1]

Again, an agreement by a Hindu at the time of his marriage with his first wife not to marry a second wife whilst the first was living would be void according to the literal terms of this section.[2] Did the legislature contemplate it? Mulla rightly commented that 'it may be doubted whether such a result was ever contemplated by the Legislature'.[3]

Agreement in restraint of trade

Section 27 lays down that—

> every agreement by which any one is restrained from

---

[1] Badu Vs. Badarannesa (1919) 29 C.L.J. 230.
[2] Mulla. *The Indian Contract Act*, students edition, 10th edn., p.97.
[3] ibid.

exercising a lawful profession, trade or business of any kind, is to that extent void.

Exception 1. - Saving of agreement not to carry on business of which goodwill is sold: One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein:
Provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

Ambit of section 27: Does it require the restraint to be absolute?

The scope of this section is very wide so as to invalidate many agreements which are allowed even by common law. The section declares all agreements in restraint of trade (meaning a lawful profession, trade or business of any kind) as void by its general terms indiscriminately as it appears from the plain reading of this section. So, even an agreement by which a partial restraint is imposed upon trade that will be void. To escape the prohibition, it is not enough to show that the restraint created by an agreement is partial, and not general; it must be distinctly covered by the exception mentioned in the section.[1] It was contended in *Madhub Chander Vs. Raj Coomar*[2] to validate an agreement in restraint of trade in terms of partial local restraint but the contention was rejected by the court where Justice Couch decided the agreement to be void holding that *"the words 'restrained from exercising a lawful profession, trade or business', do not mean an*

---

[1] Mulla on *The Indian Contract Act*, students edition, 10th edn., p.98.
[2] (1874) 14 BLR 76.

absolute restriction, and are intended to apply to a partial restriction, a restriction limited to some place."

So, the words 'restrained from exercising a lawful profession, trade or business' show the clear intention of the legislature to apply it even to a partial restraint, in terms of time or place, and obviously it does not require the restraint to be absolute to be termed as void under section 27. One of the conditions of the section mentioned exception is that the restraint must be partial and it proves again the above meaning to be true that section covers every type of restriction, otherwise there would have been no further necessity of incorporation of such exception. The words used in section 28 lay down that an agreement in restraint of legal proceeding to be void the restraint, *inter alia*, must be absolute. Section 27 uses no such word and so that the requirement of an absolute restraint cannot be imported here in any way. Thus the section does not distinguish between total restraint and partial restraint for the purpose of the legal consequence.

Agreements not in restraint of trade

Handley, J., says that the object of this section is to restrict "contracts by which a person precludes himself altogether either for a limited time or over a limited area from exercising his profession, trade, or business, nor contracts by which in the exercise of his profession, trade, or business, he enters into ordinary agreements with persons dealing with him which are really necessary for the carrying on of his business." [3]

Section 27 must be interpreted reasonably so as not to invalidate the common form of contracts which may

[3] Mackenzie Vs. Striramiah (1890) 13 Mad. 472. 475.

apparently seem to be made in restraint of trade. Thus if some one enters into a contract with a manufacturer that he will sell his all products to him and not to any one else, is not an agreement in restraint of trade within the ambit of section 27.

Thus a stipulation in an agreement whereby the plaintiffs agreed that they would not sell to others for a certain period any goods of the same description they were selling to the defendant is not in restraint of trade.[1] Similarly an agreement to sell all the salt manufactured by the defendant during a certain period to the plaintiff at a certain price is not in restraint of trade.[2]

Agreements in restraint of legal proceedings:

Section 28 says—

> Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.
>
> *Exception 1.*— This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration and that only the amount awarded in such arbitration shall be recoverable in respect of that dispute so referred.
>
> When such a contract has been made, a suit may be brought for its specific performance, and if a suit other

---

[1] Carlisles, Nephews & Co. Vs. Ricknauth Bucktearmull (1882) 8 Cal. 809; Mulla, *Law of Contract*, 10th ed., p.99.
[2] Sadagopa Ramanjiah Vs. Mackenzie (1891) 15 Mad. 79; Mulla, *Law of Contract*, 10th ed., p.99.

than for such specific performance, or for the recovery of the amount so awarded is brought by one party to such contract against any other such party in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.

Exception 2.— Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

Conditions to be satisfied to make an agreement void under section 28:

Every agreement in restraint of legal proceedings is not void, rather the following conditions are to be satisfied to make an agreement void on this ground under section 28:

i. The restraint must be absolute.

ii. The restraint must be regarding rights under or in respect of any contract.

iii. It has to restrain usual legal proceedings.

iv. It has to limit the time for enforcement of the right.

The restraint must be absolute:

The first condition to be satisfied is that it must restrain the person from enforcing his right absolutely, so if any way remains open before him then the section will not come into operation. Thus the partial restraint of legal proceedings shall not invalidate an agreement within the ambit of section 28 In other words, to make an agreement void a party must be restricted absolutely from enforcing his rights under or in respect of any contract. The language of section 28 of the Contract Act is clear by itself, and can only mean that a

contract which absolutely restricts any party to it from enforcing his rights under or in respect of such a contract by the usual legal proceedings 'in the ordinary tribunals' of the country, will to that extent, be void.[1]

The restraint must be regarding rights under or in respect of any contract:

In other words it will not be applicable in case of wrongs or torts other than the rights under or in respect of any contract.

It has to restrain usual legal proceedings:

Section 28 makes it clear absolutely that the restraint imposed must be one that is against the enforcement of rights by the usual legal proceedings in the ordinary tribunals. So, negatively interpreting if any one is restrained from enforcing his rights before any special tribunal or following a special procedure will not be void on the ground of section 28.

Or limits the time for enforcement of the right:

This is the last alternative way to make the agreement void which says that if an agreement which makes any party bound to enforce his rights within a particular time limit other than which is set by the law. Negatively speaking, that agreement bars that party to enforce the rights after the expiry of the new time limit agreed by the parties, will be void. The Limitation Act, 1908 (Act No. IX of 1908) sets down the particular time limit within which a suit is to be instituted and if any shorter period of limitation is set by an agreement that will be void under section 28. For example, according the law of limitation in Bangladesh a suit for

[1] M A Chowdhury Vs. Murri Mitsui OSK lines limited., 22 DLR (SC) 334.

breach of contract is to be instituted within three years[2], so if the parties by an agreement limits the period within one or two years which is shorter than the three years time as fixed by the law, the agreement settling such a shorter period will be void.[3] But what will happen if the parties by an agreement provide for a longer period than is provided by the Limitation Act, 1908? Obviously, that will not come within the ambit of this section, but that agreement will be void under section 23 as it defeats the provision of other law, e.g., the Limitation Act, 1908.

Cases from DLR on section 28:

- **M.A. Chowdhury Vs. Murri Mitsui OSK Lines Ltd[4]**

> 'Burden as to who should satisfy the court as to the justification for staying the case. It now remains only to consider the question of burden, namely, as to on whom should be the burden to satisfy the court as to the justification for staying its proceedings. In such circumstances, the party who seeks to invoke the foreign jurisdiction clause, should ordinarily satisfy the court that it is just and equitable to bind the parties to their bargain. If there had been a provision similar to that of section 28 of the Contract Act in the Law of Great Britain, there too the same view would have been taken. The courts in Great Britain have taken a different view because of their willingness to recognize, as Tetly has put it "the rights of the parties to contract in almost any way they please." If there was by law any clog on such freedom the result might well have been different.

---

[2] Section 3 of the Limitation Act, 1908.
[3] Islamic Republic of Pakistan Vs. Nazar Din Khattak, 21 DLR (Peshwar) 313.
[4] (1970) 22 DLR (SC) 334.

The language of section 28 of the Contract Act is clear by itself, and can only mean that a contract which absolutely restricts any party to it from enforcing his rights under or in respect of such a contract by the "usual legal proceedings" in the "ordinary tribunals" of the country, will to that extent, be void unless protected by the exceptions to the said section. In case of competition between two courts within the country there will of course be no absolute bar but it cannot be said that where the jurisdiction of all courts within the country is taken away and exclusive jurisdiction is given to a foreign court by a contract. It will not come within the mischief of that section.'

Extensive jurisdiction clause in a bill of lading whereby jurisdiction of a country's court is ousted is to be treated no more than the Exception to section 28 of the Contract Act and does not take away the court's jurisdiction.

The "legal proceedings" and "tribunals" referred to in section 28 of the Contract Act can only mean legal proceedings and tribunals known to the legislature as ordinary tribunals in the country and the usual proceedings available in these courts.

"Ordinary tribunals" referred to in section 28 of the Contract Act should mean ordinary tribunals within the country and not every any and every kind of tribunal. The argument that because a foreign judgment can be enforced by a suit in our country, therefore, a foreign tribunal which passed that judgment is also an "ordinary tribunal" within the meaning of section 28, is clearly untenable.

Abdul Razzak Vs. East Asiatic Co.[1]

Section 28 of the Contract Act makes void only that agreement which absolutely restricts a party to a contract

[1] (1952) 5 DLR 394.

from enforcing his right under the contract in ordinary tribunals but has no application when a party agrees not to restrict his right under the ordinary tribunal but only agrees to the selection of a particular tribunal in which the suit is to be tried.

In agreeing to bring a suit in one out of the two Courts belonging to two foreign countries, both of which would be competent to try the suit, the parties cannot be said to have contracted out of the jurisdiction vested in that Court or to be depriving that Court of its jurisdiction, which it otherwise possessed. Therefore, if two parties, one being a national of Pakistan and another of Denmark agreed by their contract to have their dispute settled under the contract by a Court in Denmark according to Danish Law, it cannot be said that they have contravened the provisions of section 28 of the Contract Act.

- **Tar Muhammad & Co Vs. Federation of Pakistan**[2]

'Mutual consent cannot confer jurisdiction upon any Court which that Court might not possess under the general law nor individuals by agreement amongst themselves can divest any Court of its jurisdiction which it might possess under the general law. Section 28 of the Contract Act makes void only that contract which absolutely restricts a party from enforcing his right under the ordinary tribunal but it does not attract a party who agrees not to restrict his right in the ordinary tribunal only consents to the selection of Court in which the suit is to be decided.'

- **British India Steam Navigation Co. Vs. A. R. Chowdhury**[3]

'The clause in the bill of lading runs as follows: "The contract evidenced by this bill of lading shall be governed

---

[2] (1957) 9 DLR 197.
[3] (1967) 19 DLR 54.

by English law and disputes determined in England according to English law to the exclusion of the jurisdiction of the Courts of any other country."

The parties to the contract agreed that the Court in England which has also jurisdiction to try the suit in case of a dispute between the parties, would be the only Court which should try the suit.'

- **Osaka Shosen Koisha O. S. K Line *Vs.* Province of East Pakistan**[1]

'The defendant-petitioners case is that in the contract between the parties, as embodied in the bill of lading, it was agreed that any claim arising between the parties out of the contract and involving any breach of its terms, would be decided by the District Court of Osaka, and such a claim would be governed by the law of Japan. It was contended, in the first place, that in the aforesaid premises, no suit could be instituted against the defendants in a Court in Pakistan in violation of the above mentioned terms of the contract, namely that District Court of Osaka would be the forum for adjudication of a claim arising out of the contract. Secondly, it was argued that defendant No.1 (petitioner No.1), Osaka Shosen Koisha, O. S. K Line, with whom the contract was entered into by the plaintiff, was a company having its principal registered office at Osaka in Japan, and was, therefore, a non-resident foreign company. In this context, it was submitted that a Court in Pakistan had no jurisdiction to try the suit against the said defendant which was a foreign company residing in a foreign territory.

On behalf of the plaintiff it was argued that the terms of contract under reference come within the mischief of section 28 of the Contract Act and as such has no legal validity.

---

[1] (1965) 17 DLR 659.

Held:

The parties herein have by agreement chosen to have such matters adjudicated only in the Osaka District Court and therefore section 28 of the Contract Act has no application to such a case. In the present case there is no absolute prohibition which disentitles a party to the contract to have his claim decided in a competent Court of law. By agreement there is only a restriction upon the choice of such a Court.

The plaintiff having agreed to abide by the aforesaid clause cannot be allowed to sue the defendant, Osaka Shosen O. S. K Line in a Court in Pakistan.'

Exceptions to section 28: This section provides for the following two exceptions to the above general principle:

Reference to the arbitration: First Exception: If two or more persons agree by a contract that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred, then such a contract will be valid by way of an exception to the general principle relating agreement in restraint of legal proceedings is void.

Contract to refer questions that have already arisen: Second Exception:

This section even will not render illegal, on the ground of restraint of legal proceedings, any contract in writing by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

Thus, if according to the award of arbitration a person's legal right is barred that will not amount to an agreement in

restraint of legal proceeding to be declared as void within the meaning of section 28. It was observed in *Sadharan Bima Corporation Vs. Dhaka Dyeing and Manufacturing Co. Ltd.*[1] that—

> The arbitration agreement contained in the insurance policy in question provided that if a claim be made and rejected and an action be not commenced within three months after such rejection all benefits under the policy shall be forfeited. The Insurance Company having informed the plaintiff that their claims under the policy were not payable and as such rejected the same as per condition No. 13 of the policy and the plaintiff having not commenced any action within 3 months, have forfeited all their rights under the policy.

It was observed in *Daulatpur Traders and Co. Ltd. Vs. The Eastern Federal Union Insurance Co. Ltd.*[2] that—

> it is quite clear that cause of action to recover the laws finally accrues only when the arbitrator, arbitrators or umpire have finally settled the award as to the quantum of loss or damage, but not before that. This principle of common law has now found statutory recognition in section 28 of the Contract Act. So, condition No. 18 of the policies has the full backing of explanation (1) of section 28 of the Contract Act. It would be a clear violation of the law of contract and terms and conditions of the policy to saddle insurers with the liability to pay the loss though they never acknowledged the liability and had right to postpone a decision on liability until arbitrator had fixed the amount of loss or damage.

It was observed in *Bangladesh Air Service (Pvt) Ltd. Vs. British Airways*[3] that—

---

[1] (1991) 43 DLR 286.
[2] (1990) 42 DLR 125.

there is nothing in Exception 1 to section 28 of the Contract Act prohibiting the parties to a contract from choosing a foreign forum under the supervision of a foreign court for arbitrating its disputes. Such contract does not offend the main provision of section 28, because the local Courts still retain the jurisdiction to decide the *lis* between the parties.

The appellant is free to file a suit for damages against the respondent in the local court. The respondent is also free to ask for a stay of the suit, pending arbitration, and it is for the local court having regard to all circumstances, to arrive at a conclusion whether sufficient reasons are made out.

The plea of sovereignty and interest of the country and its citizens, if accepted, will render foreign arbitral jurisdiction absolutely nugatory.

We venture to say that such a consequence will itself be opposed to public policy, for no country lives in an island these days. Foreign arbitration clause is an integral part of international trade and commerce today.

Agreements the meaning of which are uncertain:

Certainty of the terms is obviously a pre condition to an agreement. Section 29 says:

> Agreements, the meaning of which is not certain, or capable of being made certain, are void.
>
> *Illustrations*
>
> (a) A agrees to sell to B "a hundred tons of oil." There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.
> (b) A agrees to sell to B one hundred tons of oil of a specified description, known as an article of

[3] (1997) 49 DLR (AD) 187, at paragraphs 24 & 26.

commerce. There is no uncertainty here to make the agreement void.

(c) A, who is a dealer in coconut-oil only, agrees to sell to B "one hundred tons of oil." The nature of A's trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of coconut oil.

(d) A agrees to sell to B "all the grain in my granary at Rangpur." There is no uncertainty here to make the agreement void.

(e) A agrees to sell to B "one thousand maunds of rice at a price to be fixed by C." As the price is capable of being made certain, there is no uncertainty here to make the agreement void.

(f) A agrees to sell to B "my white horse for Taka five hundred or Taka one thousand." There is nothing to show which of the two prices was to be given. The agreement is void.

The above illustrations are sufficient to give a clear idea about the law enunciated in section 29. Accordingly to be enforceable by law either the meaning of the agreement has to be clear or capable to be made clear, otherwise it will be void. It lays down that sometimes the meaning may not be clear in itself directly but one may ascertain the meaning and as such the agreement can be made certain. Thus, if in no way the meaning can be made certain in that case the agreement will be void for uncertainty.

It was held in *Ashutosh Basak Vs. S. M. Rahmatulla*[1] that a contract for permanent lease not void for uncertainty even though it depends upon payment in future of salami when

[1] (1966) 18 DLR 578.

the amount of *salami* is ascertainable by the Court. In this case[2]—

> The written statement ran as follows: "After some talk J agreed to grant a permanent settlement of the land to this defendant. The annual rent was fixed at Rs. 396 and on J's asking to pay one year's rent the defendant paid that amount and thereafter the defendant was permitted to enter into possession and start his business there. It was further agreed that a reasonable amount of *salami* which would be ascertained after measurement of land would be paid by the defendant and a regular deed of permanent lease would be executed and registered by both the parties on defendant's payment of *salami* money."
>
> *Held:*
>
> The aforesaid quotation goes to show that there was a concluded contract and all that was left out was the determination of the reasonable amount of *salami* and the execution of the lease deed for permanent settlement after payment of *nazer* money.

Agreements by way of wager:

Section 30 says—

> Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any Wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.
>
> Exception in favour of certain prizes for horse-racing—This section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate,

---

[2] *Ibid.*

prize or sum of money, of the value or amount of five hundred Taka or upwards to be awarded to the winner or winners of any horse-race.

Section 294A of the Penal Code, 1860 not affected: Nothing in this section shall be deemed to legalise any transaction connected with horse racing, to which the provisions of section 294A of the Penal Code, 1860 apply.

Agreements collateral to wagering agreements: Section 30A says—

All agreements knowingly made to further or assist the entering into, effecting or carrying out, or to secure or guarantee the performance, of any agreement void under section 30, are void.

No suit for recovery of money, commission etc., in respect of void agreements: Section 30 B says—

No suit or other proceeding shall lie for the recovery of

(a) any sum of money paid or payable in respect of any agreement void under section 30A, or

(b) any commission, brokerage, fee or reward in respect of knowingly effecting or carrying out, or aiding in effecting or carrying out, of any such agreement, or of any sum of money otherwise claimed or claimable in respect thereof, or

(c) any sum of money knowingly paid or payable on account of any person by way of commission, brokerage, fee, reward or other claim in respect of any such agreement.

Payment of guardian, executor etc., in respect of void agreements not to be allowed credit: Section 30C says—

No guardian, executor, administrator, heir or personal representative of any minor or deceased person, as the

case may be, shall be entitled to or allowed any credit in his account for or in respect of any payment made by him on behalf of such minor or deceased person in respect of any such agreement, or any such commission, brokerage, fee, reward or claim as is referred to in sections 30A and 30B.

Agreements contingent on impossible events:

Section 36 says—

> Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made."
>
> *Illustrations*
>
> (a) A agrees to pay B 1,000 rupees if two straight lines should enclose a space. The agreement is void.
>
> (b) A agrees to pay B 1,000 rupees if B will marry A's daughter C. C was dead at the time of the agreement. The agreement is void.

Analysis of section 36:

Contingent contract is a good contract generally. One specific type of contingent agreement has been declared void by this section. Contingent agreement necessarily means an agreement which is dependent on the happening or not happening of a future event. If that future event becomes an impossible one and the agreement made is dependent on the happening of that impossible event then this type of contingent agreement will be void under section 36 of the Act.

Agreements to do impossible acts:

Types of impossibility:

An impossibility may be of two types:

i. Initial, and

ii. Subsequent.

Obviously in case of initial impossibility that agreement cannot turn into a valid contract ever, because the impossibility is at its root. Thus an agreement caused by initial impossibility becomes a void agreement. First paragraph to section 56 deals with this type of void agreement which says—

> An agreement to do an act impossible in itself is void.

Illustration (a) to this section explains the law as such that if A agrees with B to discover treasure by magic, the agreement is void. Thus an agreement to write 1000 pages in one's own handwriting is a void agreement.

Compensation for loss in such a void agreement : Paragraph 3 to section 56 deals with the compensation for loss through non-performance of act known to be impossible or unlawful which says—

> Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promiser must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

Illustration (c) to section 56 explains the above law in the following words:

> (c) A contracts to marry B, being already married to C, and being forbidden by the law to which he is subject to practise polygamy. A must make compensation to B for the loss caused to her by the non-performance of his promise.

Thus, in this case, it was within the knowledge of A that since he has been already married with C, so it is not possible for him to marry B, because of being forbidden by the law to which he is subject to practise polygamy. Under this circumstance, even if this prohibition of polygamy was not within the actual knowledge of A, yet the law will presume that it was within his knowledge, because with reasonable diligence that might have known. Thus, under such circumstance law imposes upon 'A' the liability to pay compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

CHAPTER 8

CONTINGENT CONTRACTS

The Contract Act, 1872, also covers certain special types of contract. Contingent contract is one of them. Apart from simple contracts sometimes even there may be a contract dependent on any further contingency. It does not mean that certainty does not remain as one of the conditions of a contract. Because, here the act agreed to be done is certain, though its happening or not happening has been made dependent on any contingency.

What is contingent contract?

Section 31 says—

> A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.
>
> *Illustration*
>
> A contracts to pay B Taka 10,000 if B's house is burnt. This is a contingent contract.

Elements of contingent contract

The constituent elements of a contingent contract are mentioned here in the following way:

1) It is a contract.

2) It may be positive or negative, i.e., to do or not to do something.

3) It is dependent on the future event and this event—

i. is a future uncertain event, which may or may not happen, and

ii. the event must be collateral to such contract. Thus a mere conditional contract will not be treated as contingent. The event upon which the contract is dependent must be collateral to such contract. So, if a person gives a declaration for giving reward to any person who finds his lost laptop, is not a contingent contract within the meaning of section 31, because there is no collateral event upon which the agreement is dependent. But, if a person says that 'I will pay you Taka 1 Lac if your car is burnt', is a contingent contract within the meaning of section 31, because here the contract is dependent on an event (burning the car) which is collateral to such contract.

The above simple illustration with the section about fire insurance describes contingent contract nicely. It was held in *Md. Sama Mondol Vs. Md. Ahmed Sheikh*[1] that the agreement that the particular document for sale of land will be executed and registered after seeking permission from the Collector regarding the sale of the land, cannot be said to be a contingent contract as defined in section 31 of the Contract Act, inasmuch as the condition to take permission of the Collector is not collateral to the agreement but forms part of the consideration of the contract.

---

[1] (1962) 14 DLR 709.

Enforcement of contracts contingent on an event happening:

Section 32 says—

> Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.
>
> If the event becomes impossible such contracts become void.

Illustrations

(a) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.

(b) A makes a contract with B to sell a horse to B, at a specified price, if C., to whom the horse had been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to by the horse.

(c) A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.

Table: Enforcement of contracts contingent on an event happening (S.32)

Nature of the contract	*Nature of contingency*	*When will be enforceable by law?*	*When will be void?*
Contingent contract	To do or not to do anything if an uncertain future event happens.	When that future event happens, i.e., it will not be enforced unless and until the said future collateral event has happened.	If that event becomes impossible such contract become void.

Thus, this is natural that if a contract to do or not to do anything becomes dependent on the happening of a future event then that will be enforced when that event happens and in other words it will not be enforceable till happening of that event. Consequently, if that event becomes impossible such contracts will be void, because it will be no more capable to be enforceable because of the impossibility of that event on the happening of which this contract was contingent.

Enforcement of contracts contingent on an event not happening:

Section 33 deals with the enforcement of contracts contingent on an event not happening, which says—

> Contingent contracts to do or not to do anything if an uncertain future event does not happen can be enforced when the happening of that event becomes impossible, and not before.
>
> *Illustration*
>
> A agrees to pay B a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

Thus the reason for the above rule is obvious, since if a contingent contract is made to do or not to do anything if an uncertain future event does not happen can be enforced when the happening of that event becomes impossible, and not before. Because only impossibility of that event can ensure satisfaction of the condition 'future event does not happen'.

Table: Enforcement of contracts contingent on an event not happening (S.33)

Nature of the contract	*Nature of contingency*	*When will be enforceable*
Contingent contract	To do or not to do anything if an uncertain future event does not happen.	when the happening of that event becomes impossible, and not before.

When event on which contract is contingent to be deemed impossible:

Section 34 says about the case when event on which contract is contingent to be deemed impossible, if it is the future conduct of a living person, which is as follows—

> If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.
>
> *Illustration*
>
> A agrees to pay B a sum of money if B marries C. C marries D. The marriage of B to C must now be considered impossible, although it is possible that D may die and that C may afterwards marry B.

Thus the illustration given with the section is clear enough to clarify the section that if the happening of an event becomes impossible once, then that will be treated impossible forever, though there remains the possibility of being possible again. And the contingent contract based on that event will bear the consequence based on the first impossibility and that will be final.

Contracts contingent on happening of specified event within fixed time:

Section 35 says that—

> Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.
>
> Contingent contracts to do or not to do anything if a specified uncertain event does not happen within a fixed time may be enforced by law when the time fixed has expired and such event has not happened or, before the time fixed has expired, if it becomes certain that such event will not happen.
>
> *Illustrations*
>
> (a) A promises to pay B, a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.
>
> (b) A promises to pay B a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

Table: Paragraph 1 to section 35

Nature of the contract	*Nature of contingency*	*When will it be void ?*
Contingent contract	To do or not to do anything if a specified uncertain event happens within a fixed time.	It becomes void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

Table: Paragraph 2 to section 35

Nature of the contract	*Nature of contingency*	*When will it be enforceable ?*
Contingent contract	To do or not to do anything if a specified uncertain event does not happen within a fixed time.	May be enforced by law when the time fixed has expired and such event has not happened ; or before the time fixed has expired, if it becomes certain that such event will not happen.

Agreements contingent on impossible events:

Section 36 deals with the agreements contingent on impossible events, which says—

> Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.
>
> *Illustrations*
>
> (a) A agrees to pay B 1,000 Taka if two straight lines should enclose a space. The agreement is void.
>
> (b) A agrees to pay B 1,000 Taka if B will marry A's daughter C. C was dead at the time of the agreement. The agreement is void.

Thus, if the agreement becomes dependent on an impossible event then that will be termed as void, though the act actually promised to be done is not in itself impossible. It is not even essential that such impossibility is to be known to

the parties rather such an agreement will be void whether this impossibility is known or not to the parties to the agreement when the agreement is made. It must be noted here carefully that the above section used the term 'contingent agreement' instead of 'contingent contract', because such an agreement has never turned into a contract at any time in any way, so it is void from very beginning. That is why, such a transaction has been termed as agreement void, instead of void contract.

Table : Agreements contingent on impossible events: Section 36

Nature of the agreement	*Nature of contingency*	*Knowledge of the parties*	*Legal status*
Contingent agreement	To do or not to do anything, if an impossible event happens.	The impossibility of the event **is known** to the parties to the agreement at the time when it is made.	In both the cases the agreements will be void.
		The impossibility of the event **is not known** to the parties to the agreement at the time when it is made.	

CHAPTER 9

PERFORMANCE OF CONTRACT

The question of performance of a contract arises after the formation of a contract. Because, it is clear that a contract may be constituted even without having any performance from any of the two parties to a contract. Thus, after formation of a contract the first issue regarding that contract is about its performance.

Contracts which must be performed:

The law, even after formation of contracts, distinguishes those contracts into two categories, namely:

(a) Contracts which must be performed.

(b) Contracts which need not be performed.

Sometimes the law even accepts the tender of performance as valid instead of actual performance. All these rules are laid down in different sections of the Contract Act, 1872 clearly. The rules regarding the contracts which must be performed are going to be discussed at the first instance.

Section 37 says that—

> The parties to a contract must either perform or offer to perform, their respective promise, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of the death of such promisors before performances unless a contrary intention appears from the contract.

Illustrations

(a) A promises to deliver goods to B on a certain day on payment of Taka 1,000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay the Taka 1,000 to A's representatives.

(b) A promises to paint a picture for B by a certain day, at a certain price. A dies before the day. The contract cannot be enforced either by A's representatives or by B.

Principles laid down by section 37: obligation of the parties:
A contract gives rise to certain legal obligations. The foremost legal consequence which a contract bears with it is the obligation of parties to it and it remains on the shoulder of the parties until it is discharged in the way as directed by law. A contract may take place without any performance made from any of the parties to a contract. But after the formation of a contract the parties are liable to perform their contractual obligations which arise out of the contract in which they are parties. Section 37 lays down certain basic principles regarding the above liability. Accordingly, after entering into a contract two options of the same dimension are open to the parties to a contract that—

i. the parties to a contract must either perform; or

ii. offer to perform, their respective promises.

Then the law declares that even the parties need not to do any of the above things, if –

such performance is dispensed with or excused under

i. this Act, or

ii. any other law.

Thus the law says about actual performance and tender of performance. That a person after entering into a contract either has to perform his obligation or at least offer to perform his obligation unless that is excused otherwise by law. Here, offer to perform has been made equal to actual performance, because sometimes it may happen that a party to a contract offering his part of performance but the other party is not accepting it. In fact in such case the person who could not perform it actually due to the fault of another party should not be made liable for non-performance. Such an offer to perform is in fact an alternative way of being discharged from one's contractual obligation as this same is possible by actual performance. Such an offer of performance is also technically known as 'tender of performance'.

Liability of the representatives of the promisors: The second paragraph to section 37 lays down the principles regarding the liability of the representatives of the promisors. What will happen if the promisor dies before the performance of the contract? Section 37 says that in such a case the representatives of the promisors will be held liable unless a contrary intention appears from the contract. Thus the liability of the representatives of the promisors is not made direct and absolute. It has been made subject to a limitation that if it appears from the contract that it was not the intention of the parties to make liable the representatives of the promisors in case of death of the promisors then the representatives will not be liable. So, in case of death of the promisor, the representatives of the same will be liable only if their liability was not barred by their contract. Thus, in

case of death of the promisor, to make his representatives liable, the first option is given to the parties. If, the parties assign the liability on the representatives of the promisor or no contrary intention appears from the contract then only law will come into operation to make such representatives liable for the performance of the promisor who died before performance.

Illustration (b) to section 37 makes another point clear which has not been expressly mentioned in the section. The principle which has been followed, in fact, in this illustration is that in case of contract which requires the personal skill and taste, e.g., painting a picture, singing a song, the representatives will not be made liable in case of death of the promisor. The reason is obvious that such performance cannot be made by the representatives in the same manner as it was expected by the contract. It is worth mentioning here that this principle is, in fact, implied in *paragraph 2* to section 37 as it is understood obviously that in case of contract which requires personal skill and taste, it must not be the intention of the parties to make liable the representatives for performance. It is natural that only personal performance by the promisor himself is expected by such type of contract.

Rules regarding offer of performance: What will be the effect of refusal to accept offer of performance? What are the conditions to be fulfilled to gain the advantage of such legal effect? These two questions have been answered in section 38 which, in this sense, is an extension of section 37. Section 38 says—

> Where a promisor has made an offer of performance to the promise, and the offer has not been accepted, the

promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.
Every such offer must fulfill the following conditions:-

(1) it must be unconditional;

(2) it must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do;

(3) if the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

Illustration

A contracts to deliver to B at his warehouse, on the 1st March, 1873, 100 bales of cotton of a particular quality. In order to make an offer of performance with the effect stated in this section, A must bring the cotton to B's warehouse, on the appointed day, under such circumstances that B may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

Legal consequence of offer of performance: Paragraph 1 to section 38 says that if the promisor makes offer of performance and the other party does not accept it then

such an offer will give rise to the following two legal consequences:

i. *Liability of the promisor:* The promisor will not be responsible for non-performance though the promise has not been performed actually; and

ii. *Rights of the promisor:* The promisor will not lose his rights under the contract.

Thus, if the promisor supplies dinner for 100 persons as was ordered by the promisee and the promisee does not accept it after an offer of performance made by the promisor, e.g., he does not take the delivery even after submission made by the promisor. According to the first consequence such a promisor will not be further responsible though the delivery has not been made actually and as per the second consequence since the rights of such promisor under the contract is not lost so that still the promisor can validly claim the price for dinner offered to perform.

Offer made to one of several joint promisees: The last paragraph to section 38 makes it clear that if such an offer of performance is made to one of several joint promisees then it will have the same legal consequences as an offer to all of them. Thus, if 'A' makes a promise to 'B', 'C' and 'D' of which 'A' subsequently makes an offer of performance to 'B' which he refuses to accept then it will be deemed by law that it is denied by each of the promisees and after such refusal made by 'B', any other promisee cannot blame the promisor that he did not make it to him. Thus, 'A' can exercise his rights against each of the promisees.

Conditions of a valid offer of performance : *Paragraph 2* to section 38 mentions the following conditions to be satisfied

by an offer of performance to enjoy the equal status of actual performance and to claim the benefits of first paragraph:

i. *Nature of the offer of performance* : Such an offer must be unconditional and so if the promisor, in making such an offer, adds any type of condition with it then it will fail to be a valid offer of performance as required by section 38 to enjoy the legal benefits.

ii. *Time of the offer:* Section 38 uses the term 'proper' to specify the time for making such an offer of performance. What is the proper time? Obviously if any time is pre set for performance then that is the proper time and in cases where no such time is fixed this is a question of fact which ultimately implies to a reasonable time. Generally, reasonable time may imply the ordinary business hour.

iii. *Place for making such an offer:* The section uses the same term (proper) to specify the place for making such an offer of performance. Obviously if any place is pre fixed that is the proper place and if not, then it is to be decided from the circumstances being a question of fact and as such it has to be made at a reasonable place.

iv. *Two opportunities:* The person who is making such an offer of performance must give the following two reasonable opportunities to the promisee—

a) *Opportunity to see the ability:* The person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of

what he is bound by his promise to do. Thus an offer to perform a part of the promise will not suffice.

b) *Opportunity to see the quality of the goods:* If the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

Thus the former opportunity relates to the quantity whereas the later deals with the quality.

Anticipatory breach of contract: refusal to perform: Section 37 clearly imposes the liability to perform the promise. So, if the party concerned does not perform the promise within the stipulated or reasonable time then after the expiry of that time it will be a clear case of breach of contract. But what will happen if the promisor before that refuses to perform or disable himself to perform the promise? This particular issue has been discussed in section 39 which says—

> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified; by words or conduct, his acquiescence in its continuance.

Illustrations

(a) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her 100 Taka for each night's performance: On the sixth night A willfully absents herself from the theater. B is at liberty to put an end to the contract.

(b) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her at the rate of 100 Taka for each night. On the sixth night A willfully absents herself. With the assent of B, A sings on the seventh night. B has signified his acquiescence in the continuance of the contract, and cannot now put an end, to it, but is entitled to compensation for the damage sustained by him through A's failure to sing on the sixth night.

The promisee, if he pleases, may treat the notice of intention as inoperative, and await till the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as of his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it.[1]

On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss.[2]

---

[1] Frost Vs. Knight (1872) L.R. 7 Ex. 111; Ratanlal Vs. Brijmohan (1931) 33 Bom. L. R. 703.

[2] *Ibid.*

By whom Contracts must be Performed.

A promise always imposes certain liability on the promisor, but it does not necessarily mean that the promise is to be performed always by the promisor himself. There are obviously some other promises which require personal performance of the promisors. Section 40 says—

> If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it.
>
> *Illustrations*
>
> (a) A promises to pay B a sum of money. A may perform this promise either by personally paying the money to B or by causing it to be paid to B by another; and, if A, dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.
>
> (b) A promises to paint a picture for B. A must perform this promise personally.

Thus it appears that after making a promise, it can be performed by the following two types of persons under different circumstances depending on the nature of the transactions:

1. The promisor himself; or
2. Any competent person.

The promisor himself: Section 40 tells it very clearly that the promise has to be performed by the promisor himself, if it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself. For example, if a person makes a promise to sing five songs in a concert, it is natural to presume here that it is the intention of the parties that the promisor himself will sing a song. Here personal performance is required. Usually contracts involving personal skill or taste require personal performance to be made by the promisor himself, instead of performance by any authorized person.

Any competent person: In other cases the promisor or his representatives may employ a competent person to perform the promise. That means where it does not appear from the nature of the case that it is the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself in that case that need not be performed by the promisor himself, rather that type of promise may be performed by any competent person who is employed by the promisor or his representatives. For example, if there is a promise related to delivery of a car usually it is immaterial who is making the actual performance and it will suffice even if any authorized person does this act of delivery on behalf of the promisor being employed by the promisor or his representatives.

It was decided in *Laksman Mandal Vs. Muslem Uddin*[1] that as a general rule, benefits of a contract are assignable subject to any contrary intention exhibited in the contract or the document itself.[2] A contrary intention, may either be express

[1] (1953) 10 DLR 165.
[2] *Ibid.*

or arise by necessary implication. One illustration of the cases in which such a contrary intention is implied is to be found in what are commonly known as 'personal contracts' or contracts depending upon the learning, skill, solvency or any personal qualification of the assignor or the party to the contract or from whom the benefits of the contract are claimed under the particular agreement.[3] In case of a sale of immovable property accompanied by an *ekrarnama* for the reconveyance of the same property to the vendor, a subsequent purchaser of the vendor's right, he being the successor-in-interest, is entitled to enforce the right of reconveyance against the original vendee.[4] A contract in the *ekrarnama* to reconvey the land to the vendor, though does not create any interest in the land is yet capable of being transferred to a third person, and the transferee is entitled to enforce the contract of conveyance against the vendee except a *bona fide* purchaser for value without notice of the agreement.[5]

Effect of accepting performance from third person:

Does the third party has any right to perform? *or* Is the promisee bound to accept the performance from any third party? *or* What will happen if the promisee voluntarily accepts the performnace from any third party? All these questions are solved through the following sections. Section 41 says—

> When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

---

[3] *Ibid.*
[4] Jalal Ahmed Vs. Thorais Mia (1968) 20 DLR 80.
[5] *Ibid.*

Analysis:

Is the promisee bound to accept performance of the promise from a third person? The answer is 'no'. But it has been indicated in this section that, in fact, the promisee is at liberty to accept the performance from any third person and if he accepts it from a third person it will be a valid acceptance. The law is that he is at liberty to have it and he cannot be compelled to accept it as such. Thus, if any third person makes any offer of performance to the promisee which is rejected by the promisee, in such a case it will not be treated as a valid offer of performance and consequently such promisee will still be entitled to claim compensation from the promisor for non-performance of contract.

What will happen if the promisee accepts the performance from any third person? It is true that the promisee is, in fact, not bound to accept the performance of the promise from any third person but if he accepts it once from such a third person then he cannot enforce it afterwards against the original promisor.

Rules regarding the performance of joint promises

Devolution of joint liabilities:
Section 42 says—

> When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons during their joint lives, and after the death of any of them his representative jointly with the survivor or survivors, and after the death of the last survivor, the representatives of all jointly, must fulfill the promise.

Analysis:

In case of joint promise—

1. During their joint lives, all such joint promisors are liable to perform the promise jointly.

2. In case of death of any of the joint promisors the representatives of the dead promisor will be jointly liable with the surviving promisor.

3. In case of death of all joint promisors all representatives of the dead promisors will be jointly liable to perform the promise.

Condition for the application of above rule: The above laws relating to devolution of joint liabilities will not come into operation *per se*. It is dependent firstly at the option of the parties. Obviously if the parties settle otherwise in their contract, these rule of devolution of joint liability will not be effective. In that case, the different intention of the parties by which they do not make their representatives liable will be applicable. If such contrary intention is not found in the contract only then these rules will be applicable.

The intention of the parties has to be gathered not only from the words used in the contracts by the parties but also from the circumstances, their belief, knowledge and intention as expressed in their correspondence.[1] In interpreting the terms of a contract, the Court ought not to imply a term unless there is evidence that both parties must have intended that it should be terms of the contract, and the power of the Court of implying terms which the parties have not

[1] PLD 1979 Karachi 88.

expressed should be exercised very sparingly and only in cases of necessity.[1]

Compelling any joint promisor to perdorm: Section 43 says—

> When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any [one or more] of such joint promisors to perform the whole of the promise.
>
> *Each promisor may compel contribution:* Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.
>
> *Sharing of loss by default in contribution:* If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.
>
> *Explanation.* Nothing in this section shall prevent a surety from recovering from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.
>
> *Illustrations*
>
> (a) A, B and C jointly promise to pay D 3,000 Taka. D may compel either A or B, or C to pay him 3,000 Taka.
>
> (b) A, B and C jointly promise to pay D the sum of Taka 3,000. C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one-half of his debts. C is entitled to receive Taka 500 from A.'s estate, and Taka 1,250 from B.

---

[1] *Ibid.*

(c) A, B and C are under a joint promise to pay D Taka 3,000. C is unable to pay anything and A is compelled to pay the whole. A is entitled to receive Taka 1,500 from B.

(d) A, B and C are under a joint promise to pay D Taka 3,000, A and B being only sureties for C. C fails to pay. A and B are compelled to pay the whole sum. They are entitled to recover it from C.

Effect of release of one joint promisor by the promisee: Section 44 says—

> Where two or more persons have made a joint promise, a release of one of such joint promisors, by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors.

This section deals with the effect of release of one joint promisor. Thus the law says that if two or more persons have made a joint promise and any one of such joint promisors is released by the promisee, that will give rise to the following rules:

i. This release will not discharge the other joint promisor or joint promisors. In other words, other joint promisors can not argue to release them that they are of equal status and since one of them is released so the others should also be released.

ii. It does not free the joint promisor so released from responsibility to the other joint promisor or joint promisors. Thus, though that released promisor has been released by the promisee it does not release him from his liability towards his co-promisors. So, in between themselves, i.e., between the joint promisors,

the released promisor will still be liable for his promise, though not to the promisee.

Devolution of joint rights: Section 45 says—

> When a person has made a promise to two or more persons jointly, then unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors and, after the death of the last survivor with the representatives of all jointly.
>
> *Illustration*
>
> A, in consideration of 5,000 Taka lent to him by B and C, promises B and C, jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's representatives jointly with C during C's life, and after the death of C with the representatives of B and C jointly.

The rules enunciated in this section may be shown through the following Table:

Promisor	Promisee	Status of the promisee	Right to claim performance belongs to
A	B,C & D	They are alive.	B,C & D.
		B & C alive, but D dies.	B,C and representatives of D.
		B is alive, but C & D die.	B and representatives of C and D.
		They die.	Their representatives, i.e., representatives of B, C & D jointly.
Common condition: Provided no contrary intention to it is found			

Time and place for performance:

Where no application is to be made and no time is specified:

Section 46 says—

> Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.
>
> *Explanation.*- The question "what is a reasonable time" is, in each particular case, a question of fact.

The rules enunciated in this section may be shown through the following Table:

Nature of the promise	*Time for performance: fixed/ not fixed*	*When is to be performed*
To perform the promise without application by the promisee.	No time for performance is specified.	It must be performed within a reasonable time. What is a reasonable time that is a question of fact.

Where time is specified and no application to be made:

Section 47 says—

> When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.
>
> *Illustration*
>
> A promises to deliver goods at B's warehouse on the first January. On that day A brings the goods to B's warehouse, but after the usual hour for closing it, and they are not received. A has not performed his promise.

The rules enunciated in this section may be shown through the following Table:

Nature of the promise	*Time for performance: fixed/ not fixed*	*When is to be performed*	*Where is to be performed*
The promisor has under-taken to perform it without application by the promisee.	It is to be performed on a certain day.	At any time during the usual hours of business on such day.	at the place at which the promise ought to be performed.

Application for performance on certain day to be at proper time and place: Section 48 says—

> When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.
>
> *Explanation*. The question "what is a proper time and place" is, in each particular case, a question of fact.

The rules enunciated in this section may be shown through the following Table:

Nature of the promise	*Time for performance: fixed/ not fixed*	*Duty of the promisor regarding the performance*
The promisor has not under-taken to perform it without application by the promisee.	It is to be performed on a certain day.	To apply for performance at a proper place and within the usual hours of business.
What is a 'proper time and place' is, in each particular case, a question of fact.		

Place for performance of promise where no application to be made and no place fixed for performance: Section 49 says—

> When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.
>
> *Illustration*
>
> A undertakes to deliver a thousand maunds of jute to B on a fixed day. A must apply to B to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

The rules enunciated in this section may be projected through the following Table:

Nature of the promise	*Place for performance: fixed/ not fixed*	*Duty of the promisor regarding the performance*	*Where is to be performed*
A promise that is to be performed without application by the promisee.	No place is fixed for the performance.	To apply to the promisee to appoint a reasonable place for the performance of the promise.	To perform it at such place which has been fixed according to the preceding column.

Performance in manner or at time prescribed or sanctioned by promisee: Section 50 says—

> The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions.

Illustrations

(a) B owes A, 2,000 Taka. A desires B to pay the amount to A's account with C, a banker. B, who also banks with C, orders the amount to be transferred from his account to A's credit, and this is done by C. Afterwards, and before A knows of the transfer, C fails. There has been a good payment by B.

(b) A and B are mutually indebted. A and B settle an account by setting off one item against another, and B pays A the balance found to be due from him upon such settlement. This amounts to a payment by A and B, respectively, of the sums which they owed to each other.

(c) A owes B, 2,000 Taka. B accepts some of A's goods in deduction of the debt. The delivery of the goods operates as a part payment.

(d) A desires B, who owes him Taka 100, to send him a note for Taka 100 by post. The debt is discharged as soon as B puts into the post a letter containing the note duly addressed to A.

PERFORMANCE OF RECIPROCAL PROMISES.

Condition of performance:

Promisor not bound to perform unless reciprocal promisee ready and willing to perform: Section 51 says—

> When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Illustrations

(a) A and B contract that A shall deliver goods to B to be paid for by B on delivery.
A need not deliver the goods, unless B is ready and willing to pay for the goods on delivery.
B need not pay for the goods, unless A is ready and willing to deliver them on payment.

(b) A and B contract that A shall deliver goods to B at a price to be paid by installments, the first installment to be paid on delivery.
A need not deliver, unless B is ready and willing to pay the first installment on delivery.
B need not pay the first installment unless A is ready and willing to deliver the goods on payment of the first installment.

The rules enunciated in this section may be shown through the following Table:

Nature of the promise	*Order of performance*	*When is to be performed*
Reciprocal promises	To be performed simultaneously	When the pomisee is ready and willing to perform his promise. No promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Order of performance of reciprocal promises: Section 52 says—

Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and, where the order is not

expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

Illustrations

(a) A and B contract that A shall build a house for B at a fixed price. A's promise to build the house must be performed before B's promise to pay for it.

(b) A and B contract that A shall make over his stock in trade to B at a fixed price and B promises to give security for the payment of money. A's promise need not be performed until the security is given for the nature of the transaction requires that A should have security before he delivers up his stock.

The rules enunciated in this section may be shown through the following Table:

Nature of the promise	*Order of performance is fixed or not by the contract*	*In which order it is to be performed*
Reciprocal promises	Is expressly fixed by the contract.	They shall be performed in that order which has been fixed by the contract.
Reciprocal promises	Is not expressly fixed by the contract.	They shall be performed in that order which that nature of the transaction requires.

Liability of party preventing event on which the contract is to take effect: Section 53 says—

When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he

may sustain in consequence of the non-performance of the contract.

Illustration

A and B contract that B shall execute certain work for A for a thousand rupees. B is ready and willing to execute the work accordingly, but A prevents him from doing so. The contract is voidable at the option of B; and, if he elects to rescind it, he is entitled to recover from A compensation for any loss which he has incurred by its non-performance.

The rules enunciated in this section may be shown through the following Table:

Nature of the contract	*Action done by one party*	*Legal consequences*
It contains reciprocal promises.	One party to the contract prevents the other from performing his promise.	i. The contract becomes voidable at the option of the party so prevented. ii. The party so prevented is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises:

Section 54 says—

When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance

of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

Illustrations

(a) A hires B's ship to take in and convey from Chittagong to the Mauritius a cargo to be provided by A, B receiving a certain freight for its conveyance. A does not provide any cargo for the ship. A cannot claim the performance of B's promise, and must make compensation to B for the loss which B sustains by the non-performance of the contract.

(b) A contracts with B to execute certain builders' work for a fixed price, B supplying the scaffolding and timber necessary for the work, B refuses to furnish any scaffolding or timber, and the work cannot be executed. A need not execute the work, and B is bound to make compensation to A for any loss caused to him by the non-performance of the contract.

(c) A contracts with B to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and B engages to pay for the merchandise within a week from the date of the contract. B does not pay within the week. A's promise to deliver need not be performed, and B must make compensation.

(d) A promises B to sell him one hundred bales of merchandise, to be delivered next day, and B promises A to pay for them within a month. A does not deliver according to his promise. B's promise to

pay need not be performed and A must make compensation.

The rules enunciated in this section may be shown through the following Table:

Nature of the contract	*Circumstance*	*Legal consequences*
i. It consists of reciprocal promises. ii. The performance of one promise is dependent on the performance of other promise.	The promisor of the promise last mentioned fails to perform it.	i. Such promisor cannot claim the performance of the reciprocal promise. ii. And he must make compensation to the other party to the contract for any loss, which such other party may sustain, by the non-performance of the contract.

Effect of failure to perform at fixed time:
Section 55 says—

Effect of such failure when time is not essential: When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of such failure when time is not essential: If it was not the intention of the parties that time should be of the

essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of acceptance of performance at time other than that agreed upon: If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance he gives notice to the promisor of his intention to do so.

Whether the time is in essence of the contract or not, is an important question to decide at first instance for application of the above mentioned rules. It was held in *Dula Mia Vs. Haji Md. Ebrahim*[1] that in the transactions relating to immovable property time, generally, is not the essence of the contract. Even fixation of the period of contract with power to treat it as cancelled, if not fulfilled within time, does not always make time essence of the contract.[2] The tendency of Courts relating to real property is to lean against a construction which would make time the essence of the contract unless it can be held to be the unmistakable intention of the parties.[3] It was observed in *Purnendu Kumar*

[1] (1956) 8 DLR 616.
[2] *Ibid.*
[3] *Ibid.*

Das Vs. Hiran Kumar Das[4] that there are three requisites to determine whether time is essence of contract, they are: (a) express stipulation between parties, (b) nature of property, and (c) surrounding circumstances. It was held in *Abdul Rahim Sardar Vs. Idris Ali Bepari*[5] that in case of a contract of sale generally the time may not be the essence of the contract, but, in the case of a contract, for the re-sale of the same, the time is the essence of the contract. In *Abdul Hamid Vs. Abbas Bhai*[6]—

> 'The payment of the purchase money by the vendor on account of the sale of the particular land was conditional on obtaining the necessary certificates for the Income tax and other authorities to enable registration to take place. Without arming himself with these certificates, the vendor began to call upon the vendee to complete the transaction.
>
> The vendee on the contrary was all the time insisting that the vendor should first perform his part of the contract and obtain the necessary certificates. Thereafter, on the 4th of September, 1953 when the vendor was equipped with the necessary certificates he intimated to the vendee that if the transaction be not completed within ten days from the date the contract would stand rescinded.
>
> *Held:*
>
> The principle is that if time is not originally made of the essence of a contract for sale of land, one of the parties is

[4] (1969) 21 DLR 918.
[5] (1959) 11 DLR 169.
[6] (1962) 14 DLR (SC) 24.

not entitled afterwards by notice to make it of the essence, unless there has been some default or unreasonable delay by the other party.

The rules enunciated in the above section may be shown through the following three Tables:

Table 1: *Paragraph 1 to section 55*

Nature of the contract	*Circumstance*	*Legal consequences*
i. A party to a contract promises to do a thing at or before a stipulated time. ii. The intention of the parties was that time should be of the essence of the contract.	That party fails to do that thing at or before that specified time.	The contract so much of it as has not been performed, becomes voidable at the option of the promisee.

Table 2: *Paragraph 2 to section 55*

Nature of the contract	*Circumstance*	*Legal consequences*
i. A party to a contract promises to do a thing at or before a stipulated time. ii. It was not the intention of the parties that time should be of the essence of the contract.	That party fails to do that thing at or before that specified time.	i. The contract does not become voidable. ii. But the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Table 3: *Paragraph 3 to section 55*

Nature of the contract	*Circumstance*	*Legal consequences*
The contract was voidable on the ground that the promisor failed to perform his promise at the time agreed.	The promisee elected to make the contract enforceable by law and accepts performance of such promise at any time other than that agreed.	*Rule:* The promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed. *Exception:* He can get the compensation if at the time of such acceptance, he gives notice to the promisor of his intention to do so.

Reciprocal promise to do things legal, and also other things illegal: Section 57 says—

> Where persons reciprocally promise, firstly, to do certain things which are legal, and, secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement.

Illustration

A and B agree that A shall sell B a house for 10,000 Taka, but that, if B uses it as a gambling house, he shall pay A 50,000 Taka for it.

The first set of reciprocal promises, namely, to sell the house and to pay 10,000 Taka for it, is a contract.

The second set is for an unlawful object, namely, that B

> may use the house as a gambling house, and is a void agreement.

Thus, if the contract does not become separable then obviously the whole transaction will be void, as it is mentioned in the section that for the validity partly the transaction needs to be divisible.

Alternative promise, one branch being illegal:
Section 58 says—

> In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.
>
> *Illustration*
>
> A and B agree that A shall pay B 1,000 Taka for which B shall afterwards deliver to A either rice or smuggled opium. This is valid contract to deliver rice, and a void agreement as to the opium.

Appropriation of Payments:

Application of payment where debt to be discharged is indicated: Section 59 says—

> Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

Illustrations

(a) A owes B among other debts, 1,000 Taka upon a promissory note which falls due on the 1st June. He owes B no other debt of that amount. On the 1st June A pays to B 1,000 Taka. The payment is to be applied to the discharge of the promissory note.

(b) A owes to B, among other debts the sum of 567 Taka. B writes to A and demands payment of this sum. A sends to B 567 Taka. This payment is to be applied to the discharge of the debt of which B had demanded payment.

It was held in *Acker Rahman Vs. Province of East Bengal*[1] that 'in view of section 59 of the Contact Act , the money having been put in for certain purpose must be appropriated for that purpose and if either of the parties wanted to divert it to another channel, it could be done only with the express consent of the party affected.'

Application of payment where debt to be discharged is not indicated: Section 60 says—

> Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

Thus, in the absence of any instruction from the debtor regarding the adjustment of the payment, the creditor will be

[1] (1954) 6 DLR 93.

at liberty to adjust it against any debt, and in doing so, he can even adjust it against any time barred debt, because, the law for the purpose treats all debts, time barred or not, as equal.

Application of payment where neither party appropriates:
Section 61 says—

> Where neither party makes any appropriation the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionably.

Thus the law at first gives debtor the option to decide against which debt a payment made by him will be adjusted. If he does not exercise the option then the law gives creditor the liberty to adjust against any debt. Last of all, if none of them adjust it then the settlement of law will come into operation according to section 61 which says that the payment, in such case, shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionably.

The rules regarding the appropriation of payments laid down by sections 59—61 above may be shown briefly through the following table:

Nature of the debt	*Debtor's instruction*	*Application of payment*
Single debt	Whether gives any instruction or not regarding the appropriation of payment made by him.	The payment made by the debtor shall be applied against the debt.
Several debts	Expressly or impliedly intimates that the payment is to be applied to the discharge of some particular debt.	It has to be applied as the direction and intimation made by the debtor.
Several debts	Makes no intimation and gives no direction regarding the application of the payment.	The creditor may apply it at his discretion to any lawful debt. And that can be applied even against any time barred debt.
Special circumstance: Debts are several and neither party makes any appropriation of the payment made by the debtor.		The payment shall be applied in discharge of the debts in order of time. Even it may be applied against any time barred debt. If the debts are of equal standing, the payment shall be applied in discharge of each proportionably.

Contracts which need not be performed:

Effect of novation; rescission and alteration of contract:

Section 62 says—

> If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

Illustrations

(a) A owes money to B under a contract. It is agreed between A, B and C that B shall thenceforth accept C as his debtor instead of A. The old debt of A to B is at an end, and a new debt from C to B has been contracted.

(b) A owes B 10,000 Taka A enters into an arrangement with B, and gives B a mortgage of his (A's) estate for 5,000 Taka in place of the debt of 10,000 Taka. This is a new contract and extinguishes the old.

(c) A owes B 1,000 Taka under a contract. B owes C 1,000 Taka. B orders A to credit C with 1,000 Taka in his books, but C does not assent to the arrangement. B still owes C 1,000 Taka, and no new contract has been entered into.

Thus the section makes it clear that the original contract need not be performed in the following three circumstances:

i. If the parties to a contract agree to substitute a new contract for it; or

ii. to rescind; or

iii. to alter it.

It was observed in *Abul Hashem Khan Vs. Shamsuddin Khan*[1] that when the parties to a contract agree on substituting a new contract for it, it is known as *novatio* or novation. substitution of a new contract for the original contract, such as the reconstitution of the firm between the defendant Nos. 1 and 2, is not a novation within the meaning of section 62 of

[1] (1989) 41 DLR 415.

the Contract Act.[2] Novation of contract was explained in *Noor Ahmad Vs. Md. Shafi*[3] as there being a contract in existence, some new contract is substituted for it either between the same parties or between different parties, the consideration mutually being the discharge of the old contract. It was held in *Nagendra N. Majumder Vs. Khitish Chandra Ghose*[4] that where a compromise or a contract or an agreement sets up a new contract it amounts to a novation of contract and since, in such a case the ordinary incident would be as indicated in section 62 of the Act, namely, that the original contract would no longer be liable to be performed, the effect would be to substitute the old debt for a new debt arising from the date of the compromise decree. Once a bank's borrower has become a defaulter, his stigma cannot be removed by invoking the provision of section 62 which only contemplates novation of contract or modification of the term of contract and it has little to do as to the elevation of the status of person who has already defaulted in making payment of any dues to the bank.[5]

Promisee may dispense with or remit performance of promise: Section 63 says—

> Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance or may accept instead of it any satisfaction which he thinks fit.
>
> *Illustrations*
>
> (a) A promises to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise.

---

[2] *Ibid.*
[3] (1970) 22 DLR (WP) 39.
[4] (1957) 9 DLR 661.
[5] Abdul Momen Bhuiyan Vs. Hazi Payer Ali Mia 43 DLR 97.

(b) A owes B, 5,000 Taka. A pays to B, and B accepts, in satisfaction of the whole debt, 2,000 Taka paid at the time and place at which the 5,000 Taka were payable. The whole debt is discharged.

(c) A owes B 5,000 Taka. C pays to B 1,000 Taka, and B accepts them, in satisfaction of his claim on A. This payment is a discharge of the whole claim.

(d) A owes B, under a contract, a sum of money, the amount of which has not been ascertained. A, without ascertaining the amount, gives to B, and B, in satisfaction thereof, accepts, the sum of 2,000 Taka. This is a discharge of the whole debt, whatever may be its amount.

(e) A owes B 2,000 Taka and is also indebted to other creditors. A makes an arrangement with his creditor's including B, to pay them a composition of eight annas in the Taka upon their respective demands. Payment to B of 1,000 Taka is a discharge of B's demand.

Thus the law speaks about certain options of the promisee which he may exercise if prefers to do so. Generally, if a person willingly waives his right then obviously law will not bar him to do so, though in Bangladesh waiver of fundamental rights is not so far permitted within the scope of its constitutional law and jurisprudence. The promisee, in a contract, obviously deserves the performance from the promisor wholly as promised by him. But if voluntarily waive it or satisfies with a lesser degree performance then the law will discharge the promisor from his further liability which has been waived once. the above section deals with these types of situations. Accordingly, the promisee is at liberty to do the following acts and obviously the exercise of

that liberty will give rise to some legal consequences as well as:

i. The promisee may dispense with the performance of the promise wholly.

ii. The promisee may dispense with the performance of the promise partly.

iii. The promisee may remit with the performance of the promise wholly.

iv. The promisee may remit with the performance of the promise partly.

v. The promisee may extend the time for such performance.

vi. The promisee may accept instead of it any satisfaction that he thinks fit. This is the incorporation of English principle of 'accord and satisfaction' which implies that once the promisee becomes satisfied with the lesser degree performnace from the promisor, he can not oblige the promisor further to do the whole thing as promised earlier.

In each of the above cases the promisor will enjoy the benefit of the act of the promisee and after anything is done of the above nature by the promisee, the promisee can not oblige the promisor liable further for the original promise. It was affirmed in *Abdul Jalil Chowdhury Vs. Muhammadi Steamship Company Limited*[1] that the time for performance of contract can be extended under section 63 of the Contract Act.

---

[1] (1961) 13 DLR (SC) 214.

Consequences of rescission of voidable contract: Section 64 says—

> When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if, he has received any benefit thereunder from another party to such contract, restore such benefit so far as may be, to the person from whom it was received.

A voidable contract means it may be made enforceable by law at the option of one of the parties to a contract or may be rescinded by the same. The above section deals with the legal consequences of a voidable contract which has been rescinded. following are the legal consequences of rescission of voidable contract:

i. *Discharge from the liability:* The other party need not perform any promise therein contained in which he is the promisor.

ii. *Restoration of the benefit received:* The person who rescinded the contract will be bound to restore any benefit to the person from whom he received it under that contract.

Obligation of person who has received advantage under void agreement or contract that becomes void: Section 65 says—

> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

Illustrations

(a) A pays B 1,000 Taka in consideration of B's promising to marry C, A's daughter. C is dead at the time of the promise. The agreement is void, but B must repay A the 1,000 Taka.

(b) A, contracts with B to deliver to him 250 maunds of rice before the first of May. A delivers 130 maunds only before that day, and none after. B retains the 130 maunds after the first of May. He is bound to pay A for them.

(c) A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her a hundred Taka for each night's performance. On the sixth night A willfully absents herself from the theatre, and B, in consequence, rescinds the contract. B must pay A for the five nights on which she had sung.

(d) A contracts to sing for B at a concert for 1,000 Taka which are paid in advance. A is too ill to sing. A is not bound to make compensation to B for the loss of the profits which B would have made if A had been able to sing, but must refund to B the 1,000 Taka paid in advance.

Thus the section deals with the obligation of person who has received advantage under void agreement or contract that becomes void. Law says that if an agreement is discovered to be void, or when a contract becomes void, it will have the following legal consequence:

i. *Restoration of advantage:* The person who has received any advantage under such agreement or contract is bound to restore it to the person from whom he received it.

ii. *Making compensation:* If the person who has received any advantage under such agreement or contract can not restore it to the person from whom he received it, then he has to compensate that party for the same.

It was held in *Amanullah Vs. M/s. Karnaphuli Paper Mills Ltd.*[1] that any person receiving advantage under a void agreement is bound to restore the goods obtained under the agreement or to make compensation for it. In the case of *Shah Pasand Khan Vs. Ihsan*[2]—

> "Minor entering into mortgage by fraudulently representing him as major and subsequently instituted a suit as plaintiff for restitution of mortgaged property; it was held that restitution of property is to be ordered but the minor must be made to refund the consideration money. Maxim: he who seeks equity must do equity. In such a case the law is—
>
> 1) If there is a fraudulent representation as to age by the minor, and,
>
> 2) if he brings an action as a plaintiff, the restitution of the immovable property is to be ordered but the minor must refund the consideration."[3]

---

[1] (1971) 23 DLR 207.
[2] (1969) 21 DLR (WP) 362.
[3] *Ibid.*

Mode of communicating or revoking rescission of voidable contract:

Section 66 simply says—

> The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.

Effect of neglect of promisee to afford promisor reasonable facilities for performance:

Section 67 says—

> If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.
>
> *Illustration*
>
> A contracts with B to repair B's house.
>
> B neglects or refuses to point out to A the places in which his house requires repair.
>
> A is excused for the non-performance of the contract if it is caused by such neglect or refusal.

Thus the law obliges even the promisee to afford reasonable facilities to the promisor for the perfromnace of the promise and the law made it absolutely clear that if due to the refusal or even neglect of the promisee to afford reasonable facilities to the promisor, the promisor will be excused by such neglect or refusal as to any non-performance caused thereby. So, if the promisor fails to perform his promise due to such non-cooperation then he will be excused from liability for such non-performance.

Performance of contract and supervening impossibility:

Section 56 deals with the doctrine of supervening impossibility which is an important issue in the field of performance of contracts. The supervening impossibility protects the promisor from the liability to perform the promise since that impossibility makes the contract void. As it has been said earlier that the impossibility may be of two types, i.e., initial and subsequent, it is the subsequent impossibility or illegality that makes a contract void. This is apparent in the definition of void contract which basically says that a void contract was once upon a time a valid contract and subsequently it lost its enforceability by law for some reasons. The contract caused by supervening impossibility is one example of void contract where the promisor is freed from his liability provided this is not self induced and even the promisor could not prevent it. Paragraph 2 to section 56 deals with this issue which says—

> A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible of unlawful.

The *illustrations (c), (d)* and *(e)* of section 56 of the Act explain the law clearly which are as follows:

(c) A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.

(d) A contracts to take in cargo for B at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.

(e) A contracts to act at a theatre for six months in consideration of a sum paid in advance by B. On several

occasions A is too ill to act. The contract to act on those occasions becomes void.

The rules enunciated in this section may be shown through the following Table:

Table 1: *Paragraph 2 to section 56*

Nature of the contract	*Circumstance*	*Legal consequences*
A contract to do an act. It implies the existence of a valid contract to do something.	It becomes impossible or unlawful, by reason of some event which the promisor could not prevent. It implies that the impossibility or illegality must not be self induced and it also must be proved that he applied his every force to prevent the impossibility but failed.	The contract becomes void when the act becomes impossible of unlawful.

Conditions for supervening impossibility under section 56:

Thus, to make a contract void under section 56 the following conditions must be satisfied:

(a) *Subsequent impossibility:* After a contract comes into existence it becomes impossible or unlawful. It was held in *Mokbul Hossain Khondker Vs. Jaheda Khatoon*[1] that to attract the doctrine of frustration of contract the performance of the contract must become absolutely impossible due to the happening of some unforeseen event.

(b) *Promiosr's inability:* This impossibility happens without any participation of the promisor. Even it must be

[1] (1995) 47 DLR 430.

proved also that the promisor could not prevent the incident which made it impossible. Thus, self induced impossibility or impossibility arising out of the negligence of the promisor will not come within the purview of this rule. So, even if it can be proved that if the promisor would be active and vigilant instead of being passive and negligent that impossibility had not been occurred, then it will not be treated as a case of void contract under this section.

Grounds for supervening impossibility:

The valid grounds for supervening impossibility are-

i. *If the subject matter is destroyed*. Suppose, after entering into a contract for sale of a house, if before the delivery of possession, the house is demolished with soil by a sudden earthquake. This is a subsequent impossibility in which the promisor did not participate, he could not prevent or even it did not occur due to his negligence.

ii. If after the contract is made, before its performance takes place, *the promisor dies or somehow his personal capacity to perform the same is lost*, which was beyond his power, that will be a case of supervening impossibility. For example, if a singer after entering into a contract to perform in an orientation program of the law students, the vocal cord of that singer becomes injured by an accident, the contract will be void.

iii. Sometimes even the *failure or frustration of the ultimate object* makes the contract void. Suppose, if a person of Chittagong hired a room in a hotel in Dhaka city to enjoy the test match to be held between Bangladesh

and Pakistan, the contract will be void if the test match is postponed for some reasons beforehand, because of the frustration of the ultimate object in the contract. In such a case obviously the other party must be aware of the fact of the ultimate object. But a mere failure of a mere object does not amount to make the contract void.

iv. By *passing a law subsequent to entering into a contract* which have the impact of making that very performance prohibited, will make the contract void.

v. *If war is started* between two states then all contracts entered into between the citizens of these two states may be void.

vi. But *the difficulty of performance or commercial impossibility will not be treated as a valid ground for supervening impossibility*. Suppose if after entering into a contract the production cost becomes higher than the sale price, this is a case known as commercial impossibility, which will not make a contract void.

The doctrine of supervening impossibility in Bangladesh is known in England as the 'doctrine of frustration of contract'.

Cases from DLR relating to section 56:

- **Azizur Rahman Vs. Abdus Sakur**[1]

  Doctrine of frustration of contract is applicable to leases of immovable property in case where provision of section 108(e) of the Transfer of Property Act cannot be attracted due to complete destruction of the subject matter of the tenancy.

[1] (1984) 36 DLR (AD) 195.

- **Chandpur Mills Ltd. Vs. Official Liquidator Economic Aid Corporation**[1]

  In order to invoke the doctrine of frustration of contract, the first and the most important condition is to show that an interference by some authority or circumstance beyond the control of the parties, has taken place as to have made it impossible to continue with the contract by destroying the very basis of the contract itself or striking at its root.

  But if the supervening difficulty or event has been deliberately brought about by the choice of one of the contracting parties, there is no room for the invocation of the doctrine of frustration.

  In the present case the seizure of the premises by the police having taken place by the misdeed of the tenant (one of the contracting parties) the tenancy has been frustrated and, therefore, the contract cannot be enforced.

  On the question as to what is the effect of the appointment of liquidator on a subsisting contract entered into between a Company in liquidation and third party (the petitioner Company) it cannot be laid down as a general proposition that where a liquidator is appointed, all contracts become automatically terminated and it is not possible for the liquidator to continue the said contracts.

  Thus, where the liquidator retains the premises belonging to the third party (the petitioner Company) for storing the assets of the company under liqudation which he intends to sell subsequently, he must be taken to have retained the possession of the premises for the purpose of the winding up and, therefore, the third party is entitled to recover arrears of rent from the liquidator which have accrued from the commencement of the winding up to the period

[1] (1960) 12 DLR 25.

of time that the liquidator retained the said premises for the purpose of the winding up.

Neither the sealing or the seizure of the premises, of which the liquidator has retained possession, by the police is of such a nature as to make the performance of the contract of lease entered into by the Company in liquidation and the 3rd party (the petitioner Company) impossible or that it was of such a kind that had it been in the contemplation of the parties they would definitely have provided for the termination of the contract in the event of such a thing happening.

- **Al Haj Kutubuddin Ahmed Vs. Abu Jafar**[2]

The plaintiff's contract of lease having been made before the coming into operation of section 75-A of E. B. State Acquisition and Tenancy Act was lawful at the time when it was made. But the object of the contract, that is, the demise of the suit property being now prohibited under section 75-A, this section has rendered the object of the plaintiff's contract of lease unlawful and thereby made the contract itself void.

Further, the doctrine of frustration coming within the purview of the second paragraph of section 56 of the Contract Act comes into play with the result that the plaintiff's contract of lease has become void and unenforceable also under the provisions of section 56, paragraph second, of the Contract Act.

An executory contract does not create a vested interest due to the operation of section 75-A of E. B. State Acquisition and Tenancy Act, section 56 of the Contract Act renders the contract for lease of land unenforceable.

---

[2] (1962) 14 DLR 128.

The question to be considered is whether it is necessary that the right acquired by the plaintiff under his contract of lease may properly be called as a vested right.

The contract of lease in question is a mere executory contract, it is a simple agreement and is not a deed effecting an actual demise or operating as a lease in preasenti. Therefore the right acquired by the plaintiff under the contract is only a contractual right to have a lease of the suit properties on the fulfillment of the terms mentioned therein but is not a completed and accomplished right so as to be termed as vested right.

When no vested right accrued to the plaintiff under the contract of lease, that contract fall within the mischief of the aforesaid section 75-A and is, therefore, hit by section 56 of the Contract Act.

- **Abdul Mutalib Vs. Musammat Rezia Begum**[1]

The doctrine of frustration, as embodied in section 56 is applicable only to executory contract whereunder performance or further performance of a promise is outstanding, but does not apply to a transaction which is complete and has already created a right in immovable property in favor of a party.

- **M/s. Begum Mills Vs. Arag Ltd.**[2]

A buyer of Chittagong placed an order of purchase with the seller at Karachi for 700 bags of rape-seeds. The seller put the goods on board the ship on two dates, that is, 11.10.58 and 16.10.58. Notices to retire the shipping documents to the buyer were served on 1.11.58 and

[1] (1970) 22 DLR (SC) 134.
[2] (1974) 26 DLR 329.

2.11.58, but he failed to retire them. Martial Law Regulation fixing the price (at a lower rate) of rape-seeds was passed on 10.11.58. The seller thereupon sold them at a loss. Buyers responsible for the loss for the consignment in respect of which he was notified on 1.11.58, i.e., before price-fixation by the Martial Law but not for the latter except the incidental expenses in connection with the consignment.

Plaintiff (respondent herein) sued the defendant for Rs. 21,308/- being the amount of loss on resale of 700 bags of rape-seeds as a result of the defendant's refusal to pay the purchase price for the said number of rape-seeds bags.
The defendant (at Chittagong) wrote to the plaintiff (at Karachi) on 6.10.58 the following letter which shows the terms of purchase:

> "Please arrange shipment of 700 bags of rape-seeds weighing 1,400 maunds during November 1958 at the rate Rs. 89/15/9 per bag F. O. B. which we have purchased from you. Send the B/L to us and the mark on bags."

The steps that are taken (on F.O.B. contract) is that the plaintiff sends the bills of lading to their branch office at Chittagong who are to deliver them to the defendant against payment of price and other charges. the plaintiff shipped 350 bags under one bill of lading No. 187 and another 350 bags under another bill of lading on 11.10.58 and 16.10.58 respectively. On receipt of their bills of lading the defendant was notified on 1.11.58 and 21.11.58 respectively to retire them on payment of invoice value which the defendant failed to do. Ultimately the plaintiff had to resale those 700 bags on 2.12.58 and 31.12.58 at a price fixed by the Martial Law Regulation which came into operation on 10.11.58 fixing the price of rape-seeds (and which is lower than the price at which the rape-seeds were sold to the defendant) and as a result incurred the

loss of the aforesaid sums for recovery of which the plaintiff sued the defendant.

The defendant's plea was the frustration of contract due to the sudden fixation of price of rape-seeds under Martial Law Regulation and the loss incurred was due to the said price fixing regulation which, the defendant contended, rendered the contract illegal and void and its performance impossible.

The Trial Court found that according to the terms of contract the plaintiff-company shipped the required quantity long before the price of rape-seeds was fixed under the Martial Law Regulation, though one of the consignments consisting of 350 bags of rape-seed arrived at Chittagong after the Regulation came into force and accordingly decreed the plaintiff's suit.

The only question which arises for detrmination is whether, in view of the promulgation of the Martial Law Regulation fixing price of rape-seeds in both wings of Pakistan, the defendant's liability to make payment of the price of 700 bags of rape-seed as originally agreed upon against delivery of the bills of lading, still remained.

The question is when 700 bags of rape-seeds were purchased –on the dates of shipment or the dates of the notification to take delivery of the bills of lading?

Plaintiff's case is that delivery took place as soon as the goods were put on board the ships at Karachi, i.e., on 11.10.58 and 16.10.58. Upon shipment, the property in the goods passed from the plaintiff; and the passing of property it could not be said to have been postponed till the moment when the defendants were notified of the arrival of the shipping documents and were asked to make payment of the price and other charges against their delivery.

Held:

Since it is found that the practice of the plaintiff (company) is to send the shipping documents to their branch office at Chittagong to be delivered against payment, it is clear that the plaintiff (company) did not intend to pass the property at the moment the cargo was placed on board. Had the plaintiff company desired to pass the property in the goods at the time the goods were shipped they would have immediately sent the bills of lading and the invoice to the defendants or at least communicated to them the news of shipment of the goods.

The defendant became aware of what is technically known as appropriation of the goods to the contract and shipment on 1.11.58 and 21.11.58 respectively, the dates on which the plaintiff (company) communicated to the defendant to retire the shipping documents.

The position, therefore, is that property in the goods was intended to pass on 1.11.58, the date on which the defendant was notified to retire the shipping documents.

So far as the 350 bags of the first consignment is concerned, the intimation to take delivery being earlier than 10th November, 1958, the defendants are under an obligation to pay the price for the consignment. Their liability to pay the price for the 350 bags which arrived later as per contract did not arise because the defendant was informed to take delivery of the bill of lading on 21.11.58 which later than the date of notification of the price fixing regulation. But as the insurance and the freight charges were paid by the plaintiff on the defendant's account and the latter did not repudiate the contract before shipment on 16.10.58, the plaintiff respondents are entitled to receive payment 0f those sums.

In the result the defendant is to pay the plaintiff the amount of Rs. 10,922/14/6, the loss incurred on resale of

353 bags of rape-seeds. The decree in respect of the amount claimed by the plaintiff for the subsequent consignment is set aside, minus the sums on account of the insurance premium, etc. paid by the plaintiff on the defendant's account in respect of subsequent consignment of the 350 bags which the defendant must pay to the plaintiff.

CHAPTER 10

OF CERTAIN RELATIONS RESEMBLING THOSE CREATED BY CONTRACT

There are certain circumstances where due to the technicalities of laws the existence of any contract cannot be proved directly. Under these circumstances, law gives certain guidelines regarding those transactions declaring the status as of certain relations resembling those created by contract. Thus, following this device a minor is imposed quasi-contractual liability for necessaries supplied to him or his dependents.

Claim for necessaries supplied to person incapable of contracting, or on his account: Section 68 says—

> If a person incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.
>
> *Illustrations*
>
> (a) A supplies B, a lunatic, with necessaries suitable to his condition in life. A is entitled to be reimbursed from B's property.
>
> (b) A, supplies the wife and children of B, a lunatic, with necessaries suitable to their condition in life. A is entitled to be reimbursed from B's property.

The rules enunciated in this section may be shown through the following Table:

Supplier	*Supplied to whom*	*What is supplied*	*Legal liability*
Any person	i. To a person incapable of entering into a contract (e.g. minor, lunatic); *or* ii. Any one whom he is legally bound to support (e.g., wife of the lunatic).	Necessaries suited to his condition in life	The supplier is entitled to be reimbursed from the property of such incapable person.

Thus, here the law presumes the existence of a quasi-contract, because of the legal barrier to constitute a valid contract with incompetent persons. At the same time the liability becomes different, as it is imposed against the property of such incapable person, so the liability is not of personal nature here. Such liability is again restricted only in case of supply of the 'necessaries', and what is 'necessaries; that is a question of fact, things which are required to lead the life reasonably according to the condition of one's life. More has been discussed about 'necessaries' in the chapter on 'capacity of parties'.

Reimbursement of person paying money due by another in payment of which he is interested: Section 69 says—

> A person who is interested in the payment of money which another is bound by law to pay and who therefore pays it, is entitled to be reimbursed by the other.

Illustration

B holds land in Bangladesh, on a lease granted by A, the zamindar. The revenue payable by A to the Government being in arrears, his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of B's lease. B, to prevent the sale and the consequent annulment of his own lease, pays to the Government the sum due from A. A is bound to make good to B the amount so paid.

Thus, if a person merely pays the debt of another person without any contract between them, then obviously he can not claim anything for that voluntary payment made for another. But if he is an interested party in that payment, then he will be reimbursed from his property though actually the debt was not of his own.

Obligation of person enjoying benefit of non-gratuitous act:
Section 70 says—

Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

Illustrations

(a) A, a tradesman, leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay A for them.

(b) A saves B's property from fire. A is not entitled to compensation from B, if the circumstances show that he intended to act gratuitously.

Thus the section lays down the following points:

i. A person lawfully does anything for another person, or delivers anything to him.

ii. That person did not intend to do it gratuitously.

iii. Such other person enjoys the benefit thereof.

iv. The later, i.e., the person who enjoyed the benefit, is bound to make compensation to the former in respect of the thing so done, or as the case may be,

v. The later is bound to restore to the former the thing so delivered and if the thing is not capable to be restored then he has to compensate for it.

Liability of person to whom money is paid or thing delivered, by mistake or under coercion: Section 72 says—

> A person to whom money has been paid or anything delivered by mistake or under coercion, must repay, or return it.

Illustrations

(a) A and B jointly owe 100 Taka to C. A alone pays the amount to C, and B, not knowing this fact, pays 100 Taka over again to C. C, is bound to repay the amount to B.

(b) A railway company refused to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee

> pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

In the case of *Federation of Pakistan Vs. Dawood Corporation*[1] the import duty paid prior to the date on which a consignment was lifted cannot be said to have been by mistake and it was held that such voluntary payment cannot be asked to be refunded. But when any duty is paid under protest after it has ceased to be payable, the same is recoverable.[2]

---

[1] (1958) 10 DLR 258.
[2] *Ibid.*

CHAPTER 11

CONSEQUENCES OF BREACH OF CONTRACT

Jurisprudentially speaking, one of the elements of law is that it cannot be violated with impunity. So, if anything is done in violation of any law, there must have certain remedies. Thus a contract since is enforceable by law, creates certain actionable claim. Generally, in case of civil wrong, compensation is awarded as remedy for the wrong done to any person. The Contract Act, 1872 also deals with this issue which includes the provisions regarding assessment of damage and the rules of payment, because even a wrong doer should not be made bound to pay for every loss suffered by the other party.

Compensation for loss or damage caused by breach of contract: Section 73 says—

> When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract: When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation.- In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

Illustrations

(a) A contracts to sell and deliver 50 maunds of saltpetre to B, at a certain price, to be paid on delivery. A breaks his promise. B is entitled to receive from A, by way of compensation, the sum, if any, by which the contract price falls short of the price for which B might have obtained 50 maunds of saltpetre like quality at the time when the saltpetre ought to have been delivered.

(b) A hires B's ship to go to Chalna, and there take on board on the first of January, a cargo which A is to provide and to bring it to Chittagong, the freight to be paid when earned. B's ship does not go to Chalna, but A has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. A avails himself of those opportunities, but is put to trouble and expense in doing so. A is entitled to receive compensation from B in respect of such trouble and expense.

(c) A contracts to buy of B, at a stated price, 50 maunds of rice, no time being fixed for delivery. A afterwards informs B that he will not accept the rice if tendered to

him. B is entitled to receive from A by way of compensation, the amount, if any, by which the contract price exceeds that which B can obtain for the rice at the time when A informs B that he will not accept it.

(d) A contracts to buy B's ship for 60,000 Taka, but breaks his promise. A must pay to B, by way of compensation, the excess, if any, of the contract price over the price which B can obtain for the ship at the time of the breach of promise.

(e) A, the owner of a boat, contracts with B to take a cargo of jute to Mymensingh for sale at that place, starting on a specified day. The boat owing to some avoidable cause, does not start at the time appointed, whereby the arrival of the cargo at Mymensingh is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo the price of jute falls. The measure of the compensation payable to B by A is the difference between the price which B could have obtained for the cargo at Mymensingh at the time when it would have arrived if forwarded in due course, and its market price at the time when it actually arrived.

(f) A Contracts to repair B's house in a certain manner, and receives payment in advance. A repairs the house, but not according to contract. B is entitled to recover from A the cost of making the repairs conform to the contract.

(g) A contracts to let his ship to B for a year, from the first of January, for a certain price. Freights rise, and on the first of January the hire obtainable for the ship is higher than the contract price. A breaks his promise. He must pay to B, by way of compensation, a sum

equal to the difference between the contract price and the price for which B could hire a similar ship for a year on and from the first of January.

(h) A contracts to supply B with a certain quantity of iron at a fixed price, being a higher price than that for which A could procure and deliver the iron. B wrongfully refuses to receive the iron. B must pay to A, by way of compensation, the difference between the contract price of the iron and the sum for which A could have obtained and delivered it.

(i) A delivers to B, a common carrier, a machine, to be conveyed without delay, to A's mill informing B that this mill is stopped for want of the machine. B unreasonably delays the delivery of the machine, and A in consequence, loses a profitable contract with the Government. A is entitled to receive from B, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.

(j) A, having contracted with B to supply B with 1,000 tons of iron at 100 Taka a ton, to be delivered at a stated time, contracts with C for the purchase of 1,000 tons of iron at 80 Taka a ton, telling C that he does so for the purpose of performing his contract with B fails to perform his contract with A, who cannot procure other iron, and B in consequence, rescinds the contract. C must pay to A 20,000 Taka, being the profit which A would have made by the performance of his contract with B.

(k) A contracts with B to make and deliver to B, by a fixed day for a specified price a certain piece of machinery. A does not deliver the piece of machinery at the time

specified, and, in consequence of this, B is obliged to procure another at a higher price than that which he was to have paid to A and is prevented from performing a contract which B had made with a third person at the time of his contract with A (but which had not been then communicated to A), and is compelled to make compensation for breach of that contract. A must pay to B, by way of compensation, the difference between the contract price of the piece of machinery and the sum paid by B for another, but not the sum paid by B to the third person by way of compensation.

(l) A, a builder, contracts to erect and finish a house by the first of January, in order that B may give possession of it at that time to C, to whom B has contracted to let it. A is informed of the contract between B and C. A builds the house so badly that, before the first of January, it falls down and has to be rebuilt by B, who, in consequence, losses the rent which he was to have received from C, and is obliged to make compensation to C for the breach of his contract. A must make compensation to B for the cost of rebuilding the house, for the rent lost, and for the compensation made to C.

(m) A sells certain merchandise to B, warranting it to be of a particular quality, and B, in reliance upon this warranty, sells it to C with a similar warranty. The goods prove to be not according to the warranty, and B becomes liable to pay C a sum of money by way of compensation. B is entitled to be reimbursed this sum by A.

(n) A contracts to pay a sum of money to B on a day specified. A does not pay the money on that day; B, in consequence of not receiving the money on that day, is unable to pay his debts, and is totally ruined. A is

not liable to make good to B anything except the principal sum he contracted to pay, together with interest up to the day of payment.

(o) A contracts to deliver 50 maunds of saltpetre to B on the first of January, at a certain price. B afterwards, before the first of January, contracts to sell the saltpetre to C at a price higher than the market price of the first of January. A breaks his promise. In estimating the compensation payable by A to B, the market price of the first of January, and not the profit which would have arisen to B from the sale to C, is to be taken into account.

(p) A contracts to sell and deliver 500 bales of cotton to B on a fixed day. A knows nothing of B's mode of conducting his business. A breaks his promise, and B, having no cotton, is obliged to close his mill A is not responsible to B for the loss caused to B by the closing of the mill.

(q) A contracts to sell and deliver to B, on the first of January, certain cloth which B intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time, and too late to be used that year in making caps. B is entitled to receive from A, by way of compensation, the difference between the contract price of the cloth and its market price at the time of delivery but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.

(r) A, a ship owner, contracts with B to convey him from Chittagong to Sydney in A's ship, sailing on the first of January, and B pays to A, by way of deposit one-half of his passage-money. The ship does not sail on the first of January, and B, after being, in consequence,

detained in Chittagong for some time, and thereby put to some expense, proceeds to Sydney in another vessel, and, in consequence, arriving too late in Sydney, loses a sum of money. A is liable to repay to B his deposit, with interest, and the expense to which he is put by his detention in Chittagong, and the excess if any, of the passage-money paid for the second ship over that agreed upon for the first, but not the sum of money which B lost by arriving in Sydney too late.

Rules enunciated by section 73:

Thus the following rules have been enunciated by section 73 regarding compensation for loss or damage caused by breach of contract:

i. *For which compensation may be claimed:* Compensation may be claimed only for loss or damage which—

(a) *naturally arose in the usual course of things* from such breach, or

(b) which the *parties knew*, when they made the contract, to be likely to result from the breach of it.

Thus, the loss to be compensated must be one which either is the direct and natural consequence in the usual course of things from such breach or was within the knowledge of the parties that these may likely take place in consequence of such breach. So, a direct and natural casual connection must be established between the breach of contract and loss caused thereby for which compensation is claimed.

ii. *For which compensation cannot be claimed:* Compensation cannot be claimed for any loss or damage which is

remote. Second paragraph to section 73 makes it further clear that such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. In fact, this could be inferred from the first paragraph and even though it has been mentioned separately with clear words just for the reason that probably the legislature preferred to put emphasis on this point by expressing it in clear words. So that there will be no ambiguity in an important matter like payment of compensation for breach of contract.

Meaning of remoteness of damage: Remoteness of damage makes it non-actionable. What is the exact meaning of it? Obviously it must be considered on the basis of the circumstances of a case. The principal justification for the existence of this doctrine is that it would be unfair to impose liability upon a defendant for all losses, no matter how extreme or unforeseeable, which flow from his breach of contract.[1] The general test is that the claimant can only recover in respect of losses which were within the reasonable contemplation of the parties at the time of entry into the contract.[2] A claimant will be unable to recover damages in respect of the loss which he has suffered if he cannot establish a causal link between his loss and the defendant's breach of contract.[3] This rule of remoteness of damage was established in the famous case of *Hadely Vs. Baxendale*[4]. It was observed by *Alderson B* [5]—

---

[1] Mackendrick, Ewan, *Contract Law*, 4th edition, 2004, Palgrave, p. 415.
[2] *Ibid.*
[3] *Ibid* , pp. 418-419.
[4] (1854) 9 Exch 341.
[5] *Ibid.*

> 'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.'

iii. *Rule regarding assessment of damage:* Moreover this section adding the last paragraph to it incorporating an explanation laid down another important rule regarding the assessment of damage. This explanation says that in estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account. Thus the party who is liable for breach of contract will not have to pay compensation for the whole loss, rather he will be discharged to the extent of the part of the loss which could be avoided by the strength of a person of ordinary prudence under the similar circumstance.

Duty to mitigate the loss: It appears from section 73 that the claimant also has a duty to mitigate the loss. This duty of mitigation of loss has been neatly explained by *Ewan Mckendrick* [1] in the following words:

> 'A claimant is under a 'duty' to mitigate his loss. It is, however, technically incorrect to state that the claimant is under a 'duty' to mitigate his loss because he does not incur any liability if he fails to mitigate the loss. The claimant is entirely free to act as he thinks fit but, if he

---

1 Mackendrick, Ewan, *Contract Law*, 4th edition, 2004, Palgrave, pp. 413-414.

> fails to mitigate his loss, he will be unable to recover that portion of his loss which is attributable to his failure to mitigate. The aim of the doctrine of mitigation is to prevent the avoidable waste of resources. There are two aspects to the mitigation doctrine. The first is the injured party must take all reasonable steps to minimize his loss. The claimant is not required to 'take any step which a reasonable and prudent man would not ordinarily take in the course of his business' (*British Westinghouse Co Vs. Underground Electric Rly Co*, 1912 AC 673). The second aspect of the mitigation doctrine is that the claimant must not unreasonably incur expense subsequent to the breach of contract (*Banko de Portugal Vs. Waterlow & Sons Ltd*, 1932 AC 452).'

A share-holder in a company cannot sue the company for wrong or damage or for any loss suffered by the company and if any wrong is done or damage is done to a company, the company is the only person who can claim for damages against the person who has caused such damages.[2]

Cases from DLR on section 73:

- **Tarani Chowdhury Vs. Jaganath Rice Mills**[3]

> 'In assessing the measure of damages the principle is that the plaintiff ought to be as near as may be in the same position as if the contract has been performed.'

- **M/S. Trans Oceanic Steamship Co. Ltd. Vs. Abdul Rahman**[4]

> 'In estimating the loss or damage arising from a breach of contract to the plaintiff, the principle,

---

[2] Trang Ice and Cold Storage Company Ltd Vs. Amin Fish Farm, (1994) 46 DLR 39.
[3] (1951) 3 DLR 23.
[4] (1961) 13 DLR 585.

having regard to the explanation to section 73 of the Contract Act, is that the plaintiff must mitigate the loss.'

- **Province of West Pakistan Vs. M/s. Saaz and Co.**[1]

'It is true that in the original contract "public" auction is not provided for, nevertheless it is said that the stocks would be "auctioned". It is difficult, therefore, to appreciate how sale by private negotiation after contacting 2 or 3 parties only can be treated as amounting to sale by auction.

Such sale by private treaty cannot be treated as sale by auction or as sufficient compliance with the terms of the forfeiture clause in the original contract of sale.

The method provided for in contract could not be deviated from unless it had become impracticable to adopt such a method of disposal of the goods.

The Government with whom the respondent entered into a contract to purchase the goods was clearly not entitled to delay the sale for nearly 2½ months by not disposing of the commodity concerned after the default to lift the goods had occurred. During the period subsequent to the default the goods must be deemed to have been lying at the risk of the Government. Any fall in the market price or deterioration in the quality which might have occurred during this period must be borne by the seller who did not take immediate and prompt steps

[1] (1964) 16 DLR (SC) 511.

to mitigate the loss by selling the goods on the date of the breach.

It is the undoubted law that the plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his neglect.

The damaged recoverable by the Government had to be computed on the basis of the difference between the contract rate and the market rate prevailing on the date of the breach.'

- **M/s. A. Z. Company Karachi Vs. M/s. S. Maula Buksh Muhammad Bashir, Karachi**[2]

'Sub-section 2 of section 61 of the Sale of Goods Act, 1930 (Act No. III of 1930) empowers the Court to award interest to seller for the price of his goods at such rate as it thinks fit. Under this section a party, however, cannot claim interest on damages for breach of a contract.

Generally in the absence of an express or implied contract to pay interest, or usage of trade, interest cannot be allowed on damages for breach of contract.

The right of the seller under the agreement is to have compensation assessed by the Arbitrators and until the amount had been so determined there is no sum certain payable to the seller upon which interest can run.'

---

[2] (1965) 17 DLR (SC) 404.

'If a contract for purchase is not performed on the due date so that a breach is committed whatever damage was to result to the seller was resulted at the time when the breach is committed and section 73 allows compensation only for this damage. The further sum that the promisee demands as interest on damage cannot be claimed by virtue of section 73, but on account of the plea that compensation ought to have been paid when the promisee became entitled to it and has not been paid (*Per* Kaikus, J.).'

- Pakistan Mercantile Corporation Ltd. Vs. Madan Mohan Oil Mills[1]

'If the seller holds on to the goods after the breach of the contract the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer. In that case the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises.'

- M/s. Amin Jute Mills Vs. M/s. A. R. A. G.[2]

'Party guilty of such contract liable to pay compensation, measure of which shall be assessed on the quantum of loss sustained on account of the breach or which the parties knew to be likely to flow from the breach.

Governing principle is that the party in breach shall equalize the injured party and measure of

[1] (1966) 18 DLR 437.
[2] (1976) 28 DLR (SC) 76.

equalization is to put that party in the position had the contract been performed.

The principle is that the defaulting party must pay the difference between contract price and the market price on the date of breach.

Measure of damages is to be ascertained between the difference of the contract rate and the market rate on the date of breach. This is the rule of law, but its proof rests on facts and circumstances of each case. If there is nom market rate on the due date or no direct evidence is forthcoming, the Court is not precluded from arriving at the real rate that can fairly be gathered from the evidence and circumstances of the case.'

- **M/s. Muhammad Amin Muhammad Bashir Ltd. Vs. M/s. Muhammad Amin Brothers Ltd.**[3]

'Measure of damage is the difference between contacted price and market price prevailing on the date of the breach. Failure of a party claiming damages to produce best evidence to show details of damages should be reckoned against him.'

- **Hutchison Telecom Bangladesh Ltd. Vs. Bangladesh Telegraph and Telephone Board and others**[4]

'In an appropriate case a Court of law can apply and imply warranty, as distinguished from an express contract or express warranty, on the presumed intention of the parties and upon reason.'

---

[3] (1969) 21 DLR (WP) 238.
[4] (1996) 48 DLR (AD) 30.

- **Sadharan Bima Corporation Vs. Bengal Liner Ltd. and another**[1]

> 'The remedy under these provisions *(section 73 & 124)* of the Contract Act lies in the Civil Court, if at all, not under the Admiralty Jurisdiction on a marine Hull Policy.'

Compensation for breach of contract where penalty stipulated for: Section 74 says—

> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.
>
> *Explanation.*- A stipulation for increased interest from the date of default may be a stipulation by way of penalty.
>
> *Exception.*- When any person enters into any bailbond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable,

[1] (1996) 48 DLR (AD) 143.

upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.- A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

Illustrations

(a) A contracts with B to pay B Taka 1,000 if he fails to pay B Taka 500 on a given day. A fails to pay B Taka 500 on that day. B is entitled to recover from A such compensation, not exceeding Taka 1,000, as the Court considers reasonable.

(b) A contracts with B that, if A practises as a surgeon within Chittagong, he will pay B Taka 5,000. A practices as a surgeon in Chittagong B is entitled to such compensation, not exceeding Taka 5,000 as the Court considers reasonable.

(c) A gives a recognizance binding him in a penalty of Taka 500 to appear in court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.

(d) A gives B a bond for the repayment of Taka 1,000 with interest at 12 per cent, at the end of six months, with a stipulation that in case of default, interest shall be payable at the rate of 75 per cent, from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable.

(e) A, who owes money to B, a money-lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty, and B is only entitled to reasonable compensation in case of breach.

(f) A undertakes to repay B a loan of Taka 1,000 by five equal monthly installments, with a stipulation that, in default of payment of any installment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

(g) A borrows Taka 100 from B and gives him a bond for Taka 200, payable by five yearly installments of Taka 40, with a stipulation that in default of payment of any installment, the whole shall become due. This is a stipulation by way of penalty.

Thus it appears that if the compensation payable for breach of contract or the penalty is stipulated in the contract, then irrespective of actual loss, due to the breach of contract, an amount that will be payable will not exceed that stipulated amount. Since the agreement between the parties for sale of the suit property was enforceable in law and the term of the agreement for depositing 25% of the total consideration money was violated, the defendant legally forfeited the earnest money given by the tenderer.[1]

---

[1] James Fialay PLC Vs. Mesbahuddin Ahmed, (1994) 46 DLR 624..

It was observed in *Province of West Pakistan Vs. M/S. Mistri Patal & Co.*[2] that—

> Section 74 of the Act deals not only with the right to receive reasonable compensation but also with the right to forfeit deposits.
> The argument that section 74 of the Contract Act that deals only with the right to receive from the party who has broken a contract reasonable compensation and not the right to forfeit what has already been received by the aggrieved party cannot be accepted in view of the terms of the section. The cases in which such a view has been taken appear to have ignored the expression "the contract contains any other stipulation by way of penalty" in the section. This expression is comprehensive enough to include cases of forfeiture.
>
> Party not entitled to claim the whole amount of earnest money simply because there was a breach of the contract.
>
> It will be wrong to say that since a firm had deposited or agreed to deposit an amount as earnest money, the aggrieved party would be entitled to claim the whole amount simply because there was a breach of the contract. Such a contention does not even receive support from the cases where the view taken was that the forfeiture clause of a deposit in a contract does not come within the purview of section 74 of the Contract Act.

---

[2] (1969) 21 DLR (SC) 132.

Party rightfully rescinding contract entitled to compensation: Section 75 says—

> A person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfillment of the contract.
>
> *Illustration*
>
> A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages, to pay her 100 Taka for each night's performance. On the sixth night, A willfully absents herself from the theatre, and B, in consequences, rescinds the contract. B is entitled to claim compensation for the damage which he has sustained through the non-fulfillment of the contract.

CHAPTER 12

INDEMNITY AND GUARANTEE

Indemnity and guarantee are two special types of contracts incorporated in the Contract Act, 1872. An indemnity is a contract by one party to keep the other harmless against loss, but a contract of guarantee is a contract to answer for the debt, default or miscarriage of another who is to be primarily liable to the promisee.[1]

Laws relating to contract of indemnity:

Definition of a contract of indemnity: Section 124 says—

> A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity."
>
> *Illustration*
>
> A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 Taka. This is a contract of indemnity.

Elements of a contract of indemnity: Following are the two elements of a contract of indemnity—

---

[1] Yeoman Credit Ltd Vs. Latter (1961) 1 WLR 828, Court of Appeal, Per Holroyd Pearce LJ.

i. *Nature of the transaction:* It is a contract. So, first of all it has fulfilled all requirements to constitute a contract.

ii. *Object:* This is the distinguishing constituent element of a contract of indemnity which says that this is a special type of contract the object of which is to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person. Thus here the object is important, and a contract constituted for any other object except it will not be treated as a contract of indemnity.

Thus, suppose a luggage of a passenger is lost from Bangladesh Biman and when it was found by the airport security service no tag was attached with it. A and B both of them are claimants for the same luggage. Then Bangladesh Biman authority asked A to give an 'indemnity bond'. A entered into a contract of indemnity with Bangladesh Biman and gets the luggage in consequence of the contract of indemnity. Later on, B, the real owner of the luggage, sues Bangladesh Biman for damages and won the suit getting a decree against Bangladesh Biman. Now, Bangladesh Biman can claim compensation from A according to the contract of indemnity, because that was a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person.

Parties in contract of indemnity : Indemnifier and indemnity holder: Indemnifier and the indemnity holder, are the two parties in a contract of indemnity. The person who promises to save the other person from loss is called the 'indemnifier'. The person who is so saved by putting a claim for compensation against the indemnifier is called the 'indemnity holder'.

In the case of *Probodh Chandra Barman Vs. Abdul Rahman Abdul Gani* [1]—

> The bond was as follows: -
>
> > "In consideration of your selling merchandise to X on credit during the year 1949. I do hereby agree to keep you jointly and severally indemnified against all consequences for your so selling to X on credit and I hereby further undertake and guarantee to pay you all dues on demand payable in connection with any goods and merchandise which you have sold to X, should x fail to settle his dues within the time fixed by you."
>
> It was contended on behalf of the person executing the bond that this is not a bond of indemnity guaranteeing payment for the goods supplied to X, but it was really a contract of suretyship or guarantee. It was held that the terms of the document show that it was a promise of indemnity and not of guarantee or suretyship.

The contract of indemnity and contract of guarantee or suretyship have been distinguished in the same case[2] in the following words:

> There is a difference between a contract of guarantee and a contract of indemnity. For a contract of guarantee or suretyship there must be tripartite agreement between the creditor, the principal debtor and the surety. In the case of a contract of indemnity, it is not necessary for the indemnifier to act at the request of the debtor, whereas in the case of a contract of guarantee or surety it is necessary that surety or guarantor should give the guarantee at the

---

[1] (1960) 12 DLR 459.
[2] *Ibid.*

request of the debtor. In the former case, it is the direct engagement between the two parties thereto, whereas, in the later, there are three parties, the creditor, the debtor, and the surety, who undertakes at the request of the debtor to answer the default or miscarriage of the debtor.

Rights of indemnity-holder when sued: Section 125 says—

> The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor:
>
> 1. all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;
>
> 2. all Costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring and defend the suit.
>
> 3. all sums which he may have paid-under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorised him to compromise the suit.

Section 125, in fact, deals with the rights of the indemnity holder against the indemnifier. Thus the above section gives the promisee in a contract of indemnity (indemnity holder) to recover the following things from the promisor (indemnifier), as the case may be, provided the promisee acted within the scope of his authority:

1. *Damages:* The section says it clearly that he can claim all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies. An English authority is found on this particular point which makes it clear and tells about its justification where it has been observed[1]:

> "It is obvious that when a person has ... ... altered his position in any way on the faith of a contract of indemnity, and an action is brought against him for the matter against which he was indemnified, and a verdict of a jury obtained against him, it would be very hard indeed if when he came to claim the indemnity the person against whom he claimed it could fight the question over again, and run the chance of whether a second jury would take a different view and give an opposite verdict to the first. Therefore, by reason of that contract of indemnity, the judgment is conclusive."

2. *Costs of the suit:* The section lays down it clearly that he can claim all costs which he may be compelled to pay in any such suit, in bringing or defending it, provided that in doing so he satisfies the following conditions:

   i. He did not contravene the orders of the promisor.

   ii. He acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit.

A Kolkata case[2] explains the point very nicely as it has been observed:

> "In the case of contracts of indemnity, the liability of the party indemnified to a third person is not only contemplated at the time of the indemnity, but is the very

---

[1] Parker Vs. Lewis (1873) L.R. 8 Ch. 1035, per Mellish, L.J.
[2] Bepin Vs. Chunder Seekur Mookherjee (1880) 5 Cal. 811

> moving cause of that contract; and in cases of such a nature there is a series of authorities to the effect that costs reasonably incurred in resisting or reducing or ascertaining the claim may be recovered."

3. *Sums paid under the terms of any compromise:* Sub-section 3 to section 125 lays down it clearly that the indemnity holder can recover from the indemnifier all sums which he may have paid under the terms of any compromise of any such suit, subject to the satisfaction of the following two conditions:

   i. The compromise was not contrary to the orders of the promisor.

   ii. The compromise was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorised him to compromise the suit.

Justice Mellish observed[3]:

> "if a person has [expressly] agreed to indemnify another against a particular claim or particular demand, and an action is brought on that demand, he (the defendant) may then give notice to the person who has agreed to indemnify him to come in and defend the action, and if he does not come in, and refuses to come in, he may then compromise at once on the best terms he can, and then bring an action on the contract of indemnity."

Laws relating to contract of guarantee:

Meaning of a contract of guarantee: Section 126 says that –

> A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default.

---

[3] Parker Vs. Lewis (1873) L.R. 8 Ch. 1059.

Elements of a contract of guarantee: Following are the two elements of a contract of guarantee —

i. *Nature of the transaction:* It is a contract. So, first of all it has fulfilled all requirements to constitute a contract.

ii. *Nature and object of the contract:* This is another special type of contract by which a promise is made to perform the promise, or discharge the liability, of a third person in case of his default. Thus, in case of a contract of guarantee, the liability to perform the promise is conditional on the failure of any third person to perform his obligation. This third person is a 'stranger' in between the two parties of the contract of guarantee. So, this is a special type of contract by which a person undertakes to perform the liability of another person at the moment when that *another person* will fail to perform his obligation.

Modes of a contract of guarantee: Section 126 says that " a guarantee may be either oral or written." So, according to the Contract Act, 1872, even an oral contract of guarantee is as valid as a written one.

Parties to a contract of guarantee: There are three parties in a contract of guarantee, who have been defined in section 126, they are the following—

i. *Surety:* The person who gives the guarantee is called the "surety".

ii. *Principal debtor:* The person in respect of whose default the guarantee is given is called the "principal debtor"

iii. *Creditor:* The person to whom the guarantee is given is called the "creditor".

Consideration for guarantee: Since this guarantee is a contract, so it is obvious that it requires consideration for its construction, because of the general principle of law of contract that where there is no consideration there is no contract. What will suffice as consideration for the purpose of a contract of guarantee that has been mentioned in the following section 127 which says—

> Anything done or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.
>
> *Illustrations*
>
> (a) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise.
>
> (b) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise.
>
> (c) A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

Surety's liability: Section 128 says—

> The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

Illustration

A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by C. A is liable not only for the amount of the bill but also for any interest and charges which may have become due on it.

Thus, in the absence of any contract to the contrary the surety is liable to do everything which the principal debtor is obliged to do. It was held in *Sonali Bank Vs. Hare Krishna Das and others*[1] that—

'The liability of the principal debtor is co-extensive with that of the guarantor. A creditor is at liberty to pursue either the principal debtor or the guarantor according to his sweet will for realization of his dues or he can proceed against both of them simultaneously.'

Meaning of continuing guarantee: Section 129 says—

A guarantee which extends to a series of transactions is called a continuing guarantee.

Illustrations

(a) A in consideration that B will employ C in collecting the rent of B's *zamindari*, promises B to be responsible, to the amount of 5,000 Taka, for the due collection and payment by C of those rents. This is a continuing guarantee.

(b) A guarantees payment to B, a tea-dealer, to the amount of Taka 100, for any tea he may from time to time supply to C B supplies C with tea to above the value of Taka 100, and C pays B for it. Afterwards B

[1] (1997) 49 DLR 282.

supplies C with tea to the value of Taka 200. C fails to pay. The guarantee given by A was a continuing guarantee, and he is accordingly liable to B to the extent of Taka 100.

(c) A guarantees payment to B of the price of five sacks of flour to be delivered by B to C and to be paid for in a month. B delivers five sacks to C. C pays for them. Afterwards B delivers four sacks to C which C does not pay for. The guarantee given by A was not a continuing guarantee, and accordingly he is not liable for the price of the four sacks.

Revocation of continuing guarantee: A continuing guarantee may be revoked by notice or death.

Revocation of continuing guarantee by notice: Section 130 says—

> A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.
>
> *Illustrations*
>
> (a) A, in consideration of B's discounting at A's request, bills of exchange for C, guarantees to B, for twelve months, the due payment of all such bills to the extent of 5,000 Taka. B discounts bills for C to the extent of 2,000 Taka. Afterwards, at the end of three months. A revokes the guarantee. This revocation discharges A three months. A revokes the guarantee. This revocation discharges A from all liability to B for any subsequent discount. But A is liable to B for the Taka 2,000 on default of C.
>
> (b) A guarantees to B to the extent of 10,000 Taka, that C shall pay all the bills that B shall draw upon him. B

> draws upon C. C accepts the bill. A gives notice of revocation. C dishonours the bill at maturity. A is liable upon his guarantee.

Thus a continuing guarantee also may be terminated at any time provided the other party has been notified properly. It was observed in *Habibullah, Director of National Bank Limited and 11 others Vs. Bangladesh Bank and another*[1] that—

> 'A continuing guarantee may be revoked by the surety by giving notice as to future transaction under section 130 of the Contract Act. Such contention would be considered while considering the facts and circumstances of the concerned Rule in which the same has been raised unless the same is a disputed question of fact.'

Revocation of continuing guarantee by death: Section 131 says—

> The death of the surety operates, in the absence of any contract to the contrary as a revocation, of a continuing guarantee, so far as regards future transactions.

Thus, if there is no contract to the contrary, then the death of the surety will operate as a revocation of a continuing guarantee. But such revocation will be effective against the future transactions to be made after the death of the surety.

Joint debtors and suretyship: Section 132 says—

> Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.

---

[1] 2 BLC 520.

Illustration

A and B make a joint and several promisory note to C. A makes it, in fact, as surety for B, and C knows this at the time when the note is made. The fact that A, to the knowledge of C made the note as surety for B, is no answer to a suit by C against A upon the note.

Analysis of section 132: The rule enunciated in section 132 may be made clear by the following dissection of the section taking a hypothesis—

i. A and B, these two persons contract with C, a third person to undertake a certain liability.
ii. A and B enter into a second contract with each other that one of them shall be liable only on the default of the other.

iii. C, the third person is not a party to the second contract.
iv. The liability of each of such two persons *(A and B)* to the third person under the first contract is not affected by the existence of the second contract.

v. It is immaterial whether such third person *(C)* is aware of the existence of any such second contract or not.

Discharge of surety:

The rules regarding the discharge of sureties have been enumerated in sections 133—139, they are as follows:

Discharge of surety by variance in terms of contract: Section 133 says—

> Any variance, made without the surety's consent, in the terms of the contract between the principal [debtor] and

the creditor, discharges the surety as to transactions subsequent to the variance.

Illustrations

(a) A becomes surety to C for B's conduct as a manager in C's bank. Afterwards, B and C contract, without A's consent, that B's salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts. B allows a customer to overdraw, and the bank loses a sum of money. A is discharged from his suretyship by the variance made without his consent, and is not liable to make good this loss.

(b) A guarantees C against the misconduct of B in an office to which B is appointed by C, and of which the duties are defined by an Act of the Legislature. By a subsequent Act, the nature of the office is materially altered. Afterwards, B misconducts himself. A is discharged by the change from future liability under his guarantee, though the misconduct of B is in respect of a duty not affected by the later Act.

(c) C agrees to appoint B as his clerk to sell goods at a yearly salary, upon A's becoming surety to C for B's duly accounting for money received by him as such clerk. Afterwards, without A's knowledge or consent, C and B agree that B should be paid by a commission on the goods sold by him and not by a fixed salary. A is not liable for subsequent misconduct of B.

(d) A gives to C a continuing guarantee to the extent of 3,000 rupees for any oil supplied by C to B on credit. Afterwards B becomes embarrassed, and, without the knowledge of A, B and C contract that C shall continue to supply B with oil for ready money and that the payment shall be applied to the then existing

debts between B and C. A is not liable on his guarantee for any goods supplied after this new arrangement.

(e) C contracts to lend B 5,000 Taka on the 1st March. A guarantees repayment. C pays the 5,000 Taka to B on the 1st January. A is discharged from his liability, as the contract has been varied inasmuch as C might sue B for the money before the 1st of March.

Thus, if any change is brought in the terms of the contract between the principal debtor and the creditor without the surety's consent, then the surety will be discharged on and from the next transaction after that change is brought. the Court observed in *Moqbul Brothers and another Vs. Rupali Bank and others*[1] that—

> 'It is contended on behalf of the appellants that letter of credit was amended providing shipping of unlimited consignments and the beneficiary under the letter of credit was also changed from Khandelwal Brothers to Universal Trading Syndicate and such amendment of the letter of credit has varied the contract in such way that the appellants were discharged from all liabilities under section 133 of the Contract Act. It is held that the beneficiary was not changed. The appellants submitted an indent in the respondent bank did not say a word by way of explanation as to why the letter of credit was not established against the said indent of the appellants when the PW 1 on behalf of the respondent admitted that the letter of credit was amended without any reference to the appellants. However, when the appellants are found not to be the guarantors to the letter of credit, the question of discharge under section 133 of the Contract Act becomes academic.'

[1] 5 BLC 565.

Discharge of surety by release or discharge of principal debtor:

The discharge of the principal debtor shall operate as a discharge of the surety. Section 134 says—

> The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.
>
> *Illustrations*
>
> (a) A gives a guarantee to C for goods to be supplied by C to B. C supplies goods to B, and afterwards B becomes embarrassed and contracts with his creditors (including C) to assign to them his property in consideration of their releasing him from their demands. Here B is released from his debt by the contract with C, and A is discharged from his suretyship.
>
> (b) A contracts with B to grow a crop of indigo on A's land and to deliver it to B at a fixed rate, and C guarantees A's performance of this contract. B diverts a stream of water which is necessary for irrigation of A's land and thereby prevents him from raising the indigo. C is no longer liable on his guarantee.
>
> (c) A contracts with B for a fixed price to build a house for B within a stipulated time, B supplying the necessary timber. C guarantees A's performance of the contract. B omits to supply the timber. C is discharged from his suretyship.

Discharge of surety when creditor compounds with, gives time to, or agrees not to sue principal debtor: section 135 deals with three ways of discharge of surety which says—

> A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor discharges the surety, unless the surety assents to such contract.

Thus if the creditor enters into a contract with the principal debtor and the surety does not consent to it, then the principal debtor discharges the surety, if by the contract the creditor does any of the following three things:

i. Makes a composition ; or

ii. Promises to give time; or

iii. Promises not to sue.

Surety not discharged when agreement made with third person to give time to principal debtor: Section 136 serves as an exception to section 135 which says—

> Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.
>
> *Illustration*
>
> C, the holder of an overdue bill of exchange drawn by A as surety for B, and accepted by B, contracts with M to give time to B, A is not discharged.

Creditor's forbearance to sue does not discharge surety: Section 137, deals with another circumstance when the surety will not be discharged, which says—

> Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not in the absence of any provision in the guarantee to the contrary, discharge the surety.

Illustration

B owes to C a debt guaranteed by A. The debt becomes payable. C does not sue B for a year after the debt has become payable. A is not discharged from his suretyship.

Release of one co-surety does not discharge others: Section 138 says—

> Where there are co-sureties, a release by the creditor of one of them, does not discharge the others, neither does it free the surety so released from his responsibility to the other sureties.

Thus section 138 says about the following two-fold impacts of the release of one of co-sureties by the creditor:

i. It does not discharge other surety.

ii. It does not discharge the surety so released from his responsibility to the other co-sureties in between them.

Discharge of surety by creditor's act or omission impairing surety's eventual remedy: Section 139 says—

> If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

Illustrations

(a) B contracts to build a ship for C for a given sum, to be paid by installments as the work reaches certain stages. A becomes surety to C for B's due performance of the contract. C, without the knowledge of A, prepays to B the last two installments. A is discharged by this prepayment.

(b) C lends money to B on the security of a joint and several promissory note made in C's favour by B, and by A as surety for B together with a bill of sale of B's furniture, which gives power to C to sell the furniture, and apply the proceeds in discharge of the note. Subsequently, C sells the furniture, but, owing to his misconduct and willful negligence, only a small price is realized. A is discharged from liability on the note.

(c) A puts M as apprentice to B, and gives a guarantee to B for M's fidelity. B promises on his part that he will, at least once a month, see M makes up the cash. B omits to see this done, as promised, and M embezzles. A is not liable to B on his guarantee.

Thus, the surety will be discharged if the eventual remedy of the surety himself against the principal debtor is impaired by any of the following two things —

i. if the creditor does any act which is inconsistent with the rights of the surety; or

ii. omits to do any act which his duty to the surety requires him to do.

Rights of the sureties:

Sections 140 and 141 deal with the following two important rights of the surety:

Rights of surety on payment or performance: Section 140 says—

> Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.

Thus the section lays down another right of the surety that he has all the rights which the creditor had against the principal debtor in either of the following two circumstances:

i. Where a guaranteed debt has become due; or

ii. default of the principal debtor to perform a guaranteed duty has taken place.

Surety's right to benefit of creditor's securities: Section 141 says—

> A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not, and, if the creditor loses, or without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.
>
> *Illustrations*
>
> (a) C advances to B, his tenant, 2,000 Taka on the guarantee of A. C has also a further security for the 2,000 Taka by a mortgage of B's furniture. C cancels the mortgage. B becomes insolvent, and C sues A on his guarantee. A is discharged from liability to the amount of the value of the furniture.
>
> (b) C, a creditor, whose advance to B is secured by a decree, receives also a guarantee for that advance from A. C afterwards takes B's goods in execution under the decree, and then, without the knowledge of A, withdraws the execution. A is discharged.
>
> (c) A, as surety for B, makes a bond jointly with B to C, to secure a loan from C to B. Afterwards, C obtains from

> B a further security or the same debt. Subsequently, C gives up the further security. A is not discharged.

Thus the section lays down the following rules:

i. The surety will have the right to benefit of every security kept to the creditor by the principal debtor.

ii. The surety will have the above right irrespective of his knowledge about the existence of such security.

iii. If the creditor somehow disposes of the property kept as security, then the surety will be discharged to the extent of the value of that disposed of property.

In the case of *Central Exchange Bank Ltd. Vs. Zaitoon Begum*[1], it was held 'where, some fixed deposit receipts were deposited as additional security for certain overdraft accounts with the appellant bank and some of these fixed deposit receipts belonged to the respondent Zaitoon Begum, the Bank could not proceed against the fixed deposit receipts without exhausting Bank's remedies provided by the goods pledged with the Bank by the original debtors.'

Certain rules regarding the validity and invalidity of a contract of guarantee:

Guarantee obtained by misrepresentation invalid: Section 142 says—

> Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

---

[1] (1968) 20 DLR (SC) 117.

Thus, the section deals with the invalidity of guarantee if that is obtained by means of misrepresentation made by the creditor, or with his knowledge and assent. The only condition to be satisfied to make a guarantee invalid on this ground is that it must concern a material part of the transaction, and so, if so happens with any tiny part of the transaction that will not amount to invalidation of the guarantee.

Guarantee obtained by concealment invalid: This is another ground of invalidation of the guarantee. Section 143 says—

> Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid.
>
> *Illustrations*
>
> (a) A engages B as clerk to collect money for him. B fails to account for some of his receipts, and A in consequence calls upon him to furnish security for his duly accounting. C gives his guarantee for B's duly accounting. A does not acquaint C with B's previous conduct. B afterwards makes default. The guarantee is invalid.
>
> (b) A guarantees to C payment for iron to be supplied by him to B to the amount of 2,000 tons. B and C have privately agreed that B should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as a surety.

Thus the guarantee will be invalid if—

i. The creditor has obtained it by means of keeping silence, and

ii. Such silence was involved as to material circumstances of the transaction.

Conditional guarantee on joining of another co-surety: Section 144 says—

> Where a person gives a guarantee upon a contract that a creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

Thus, if the guarantee is made subject to a condition that the creditor shall not be bound by it until another person joins him as co-surety, in that case the guarantee will not be valid if that other person does not join.

Implied promise to indemnify surety: Section 145 says—

> In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

Illustrations

(a) B is indebted to C, and A is surety for the debt. C demands payment from A, and on his refusal sues him for the amount. A defends the suit, having reasonable grounds for doing so, but is compelled to pay the amount of the debt with costs. He can recover from B the amount paid by him for costs, as well as the principal debt.

(b) C lends B a sum of money, and A, at the request of B, accepts a bill of exchange drawn by B upon A to secure the amount. C, the holder of the bill, demands payment of it from A, and, on A's refusal to pay, sues him upon the bill. A, not having reasonable grounds for so doing, defends the suit, and has to pay the

amount of the bill and costs. He can recover from B the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action.

(c) A guarantees to C to the extent of 2,000 Taka, payment for rice to be supplied by C to B. C supplies to B rice to a less amount than 2,000 Taka, but obtains from A payment of the sum of 2,000 Taka in respect of the rice supplied. A cannot recover from B more than the price of the rice actually supplied.

Thus the section makes it clear, whether there exists actually any promise by the principal debtor to indemnify the surety or not, the existence of an implied promise will be presumed in every case that the surety will have the right to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, and he will not have any such right against the sums paid wrongfully by him.

Liability of co-sureties:

Sections 146 and 147 deal with the following two important rules regarding the liability of co-sureties:

Co-sureties liability to contribute equally: Section 146 says—

> Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.
>
> *Illustrations*
>
> (a) A, B and C are sureties to D for the sum of 3,000 Taka lent to E. E makes default in payment. A, B and C are liable, as between themselves, to pay 1,000 Taka each.

(b) A, B and C are sureties to D for the sum of 1,000 Taka lent to E, and there is a contract between A, B and C that A is to be responsible to the extent of one-quarter, B to the extent of one-quarter and C to the extent of one-half. E makes default in payment. As between the sureties, A is liable to pay 250 Taka, B 250 Taka, and C 500 Taka.

The section says about the equal contribution to be made by the co-sureties. But obviously this is not the mandatory obligation *per se*, rather it will be mandatory only in the absence of any contract contrary to it. Thus if there is no mention regarding the portion of the liability of the co-sureties, the rule of equal contribution will come into operation.

Liability of co-sureties bound in different sums: Section 147 says—

> Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.
>
> *Illustrations*
>
> (a) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 Taka, B in that of 20,000 Taka, C in that of 40,000 Taka, conditioned for D's duly accounting to E. D makes default to the extent of 30,000 Taka. A, B and C are each liable to pay 10,000 Taka.
>
> (b) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 Taka, B in that of 20,000 Taka, C in that of 40,000 Taka, conditioned for D's duly

accounting to E. D makes default to the extent of 40,000 Taka. A is liable to pay 10,000 Taka, and B and C 15,000 Taka each.

(c) A, B and C as sureties for D enter into three several bonds each in a different penalty, namely, A in a penalty of 10,000 Taka, B, in that of 20,000 Taka, C in that of 40,000 Taka, conditioned for D's duly accounting to E. D makes default to the extent of 70,000 Taka. A, B and C have to pay each the full penalty of his bond.

CHAPTER 13

BAILMENT AND PLEDGE

Meaning of bailment:

Section 148 says—

> A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor." The person to whom they are delivered is called the "bailee."
>
> *Explanation.*- If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor, of such goods although they may not have been delivered by way of bailment.

Elements of bailment:

After analyzing sections 148 and 149 the following elements are found which must be present to constitute a contract of bailment:

1. *Subject matter:* Only goods may be the subject matter of bailment and so the immovable property is not capable of being bailed.

2. *Delivery:* The goods must be delivered by one person to another. Delivery of goods generally means the handing over of the possession of the goods. Jurisprudentially speaking, obviously, that delivery may be actual or constructive.

   i. *Mode of delivery:* However, the mode of delivery of goods has been mentioned in section 149 which says—

      > The delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorised to hold them on his behalf.

   Thus it appears that by handing over the possession of the goods by putting it in the possession of the prospective bailee, the task of delivery of goods may be completed as required by the law.

   ii. *When such delivery is not required:* This fresh delivery of goods to the intended bailee may not be required in one particular exceptional case. This position has been made clear by adding the following explanation to section 148—

      > *Explanation.*- If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor, of such goods although they may not have been delivered by way of bailment.

   Thus it appears that a bailment may be made based on an earlier delivery of possession. So, if a person keeps anything in possession of another person and subsequently they enter into a contract of

bailment then the thing need not be withdrawn from the earlier person to deliver it again newly by way of bailment. In such a case, delivery of possession is not required rather a contract of bailment may be constituted based on that earlier delivery.

3. *Purpose:* This delivery of possession of goods must be made with a specific purpose. It may be made in the form of specific object or in the form of certain instructions. In whatever way this is made, the law requires that this must be a purposeful act in whatever sense. Such purpose may be manifold. It may be for the exclusive benefit of the bailor or bailee or both.

4. *Contract:* There must have a contract, as bailment is nothing but one type of contract.

5. *Content of contract: provision of returning the goods:* The contract must imply ultimately the return of the goods bailed. Thus permanent delivery of possession shall never amount to bailment. It has been made absolutely clear in section 148 that after fulfilling the purpose the goods must be returned to the bailee or must be disposed of according to the direction given by the bailor. That means, if the bailor says to dispose of it otherwise, then only 'return to the bailor' may be waived. Thus, if a person delivers a watch to another by way of bailment for repairing it, then after repairing the watch it must be returned to the owner of the watch. But if the owner (bailor) gives the bailee any other direction regarding disposal of the watch, e.g., says to deliver it to any third person, then that must be disposed of accordingly.

Duties of bailor:

The following are the duties of a bailor which have been imposed by different sections of the Act:

1) *Duty of disclosure*: The bailor has a general duty to disclose the faults of the goods bailed. Section 150 says—

> The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailer is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.
>
> If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.
>
> *Illustrations*
>
> (a) A lends a horse, which he knows to be vicious, to B. He does not disclose the fact that the horse is vicious. The horse runs away. B is thrown and injured. A is responsible to B for damage sustained.
>
> (b) A hires a carriage of B. The carriage is unsafe, though B is not aware of it, and A is injured. B is responsible to A for the injury.

After considering this section, regarding duty of disclosure, there may be two circumstances:

i. *Bailor is aware of the faults in the goods:* The first paragraph to section 150 imposes the duty upon the bailor to disclose the faults in the goods of which he has the knowledge and so that it does not impose any responsibility for any fault in the goods which was not disclosed of which the bailor did not have any knowledge. Moreover the bailor is not bound to

disclose every fault under every circumstance rather the section says that the bailor has to disclose the faults within his knowledge only under the following situations—

(a) The faults in the goods materially interfere with the use of them ; or

(b) Expose the bailee to extraordinary risks.

Thus in case of a gratuitous bailment, the bailor's duty has been confined to the faults known to him.

Consequence of non-disclosure of such fault: If the bailor does not make such disclosure as required by the above law, he will be responsible for damage arising to the bailee directly from such faults. Thus, even for non-disclosure of the faults the bailor will have the liability to compensate only for the injury which is directly consequential to such non-disclosure and negatively speaking in such a case he will not have any responsibility to pay the compensation for any indirect loss suffered by the non-disclosure of faults in the goods bailed.

11. *Bailor is not aware of the faults in the goods:* Second paragraph to section 150 imposes a strict liability on the bailor in a special case which says that if the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed. Thus, in case of goods bailed for hire the bailor is under an absolute duty of disclosing the faults whether he knows or not. In such a case he is made liable to pay compensation for loss caused by the non-disclosure of

faults in the goods bailed and in this case ignorance of the faults will not act as an excuse.

2) *Duty of repayment of necessary expenses:* The bailor has also a duty to repay the necessary expenses incurred by the bailee in case of non-gratuitous bailment. Section 158 says—

> Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

Thus by using the words".. ... ... and the bailee is to receive no remuneration ... ..." imply that the section applies in case of gratuitous bailment. Thus, in case of gratuitous bailment, the bailor shall repay the bailee the necessary expenses incurred by him for the purpose of the bailment. The justification of this duty imposed upon the bailor is that in such a bailment the bailor has been already agreed to receive no remuneration in lieu of the bailment and so that the bailee should not suffer any more loss. Thus the law is justified in imposing a duty upon the bailor to pay the necessary expenses to the bailee incurred by him for the purpose of such bailment.

3) *Duty to indemnify the borrower:* In case of gratuitous loan, the lender of a thing for use may at any time require its return, even though he lent it for a specified time or purpose; but in doing so he has to indemnify the borrower as section 159 says—

> The lender of a thing for use may at any time require its return, if the loan was gratuitous, even though he lent it for a specified time or purpose. But, if on the faith of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived.

4) ***Duty to indemnify the bailee:*** If the bailor does not have any legal right to make a bailment, but he does so without lawful authority over the goods bailed, then the bailor must compensate the bailee for loss suffered due to that unauthorized bailment. Section 164 says—

> The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods, or to give directions respecting them.

Thus, the law imposes a duty upon the bailor to compensate the bailee for any loss for making the bailment which was done without lawful authority. For example, if X gives Y's car to Z for use without Z's permission and Z sues Y and receives compensation, then X is bound to indemnify Y for his losses.

It is worth mentioning here that the above mentioned section 164 imposes the following two more duties upon the bailor:

5) ***Duty to receive back the goods bailed:*** If section 164 is analyzed properly then it becomes absolutely clear before us that the bailor is bound to receive back the

goods bailed or he should give any other direction regarding the disposal of the goods bailed.

6) ***Duty to compensate the bailee:*** If the bailor does not comply with the above duty of receiving back the goods or giving directions respecting them and the bailee in consequence of it suffers any loss then the bailor is bound to make good the loss suffered by such bailee. Thus, if a person does not take his dress from the tailor after the date of delivery then the bailor is bound to give compensation to the bailee for safe custody.

Rights of bailee:

1. ***Bailee's right of particular lien:*** This is a possessory right of the bailee to retain the goods bailed till the payment of remuneration under certain circumstances. Section 170 deals with such particular lien which says—

> Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.
>
> *Illustrations*
>
> (a) A delivers a rough diamond to B, a jeweller, to be cut and polished, which is accordingly done. B is entitled to retain the stone till he is paid for the services he has rendered.
>
> (b) A gives cloth to B, a tailor, to make into a coat. B promises A to deliver the coat as soon as it is finished,

and to give A three months' credit for the price. B is not entitled to retain the coat until he is paid.

Thus subject to the satisfaction of the following conditions the bailee has a right to particular lien:

i. The bailee has to render a service in accordance with the purpose of the bailment.

ii. The service rendered by the bailee involves the exercise of labor or skill in respect of the goods bailed.

iii. The service rendered deserves some remuneration.

iv. This remuneration is unpaid.

v. There is no contract to the contrary.

vi. The bailee is in the possession of the goods bailed.

If the above conditions are fulfilled then the bailee has the right to retain such goods bailed to him till he receives due remuneration for the service he has rendered in respect of them. This type of lien is termed as 'particular lien' because the goods may be retained only for any amount due for the services rendered to the identical goods. Thus, if a bailee renders any service in respect of goods 'A', cannot retain goods 'B' till payment of remuneration due against goods 'A' and he can retain only goods 'A' for any remuneration due against it.

It was observed in *Muhammad Meah Vs. Pubali Bank*[1] that—

'The plaintiff did not make out any case under section 170 of the Act to retain the goods a bailee. In this case the

[1] (1989) 41 DLR (AD) 14.

> plaintiff could have exercised his right under section 170 of the Contract Act if he had possession over the scheduled materials. The High Court Division's finding on the basis of the documents on record and the evidence adduced in the matter that the bank had all through been in the possession of the attached goods does not suffer from any infirmity. In fact, the plaintiff did not make out any case that he was entitled under section 170 of the Contract Act to retain the scraps as a bailee till he recovered due remuneration for the services rendered by him. In the application for attachment the plaintiff did not mention the word 'lien' nor did he do so in his written objection to the application for vacating that order.'

In the same case[2] Badrul Haider, J., observed in the minority Judgment—

> 'Under section 170 of the Contract Act a ship breaker can retain goods for his remuneration ... ... The crux of the problem as to how he could execute the decree when all the properties of *Janapad* Enterprise are mortgaged to the Bank. The only available property was the scheduled property which was valued for only eight lacs. The question was whether the plaintiff could retain this property. Plaintiff's claim for his remuneration is grounded on lien and section 170 says that he has a right to retain such goods until he receives due remuneration for the services in the absence of the contract to the contrary. Is there any contract to the contrary in this case between the Bank and the borrower that the remuneration of the breaker must not be given out of the sale proceeds of the ships? The answer is in the negative. If so then why the ship breaker will be deprived of his remuneration. It was contended by the learned Counsel appearing for the respondent that in the application for attachment the plaintiff did not mention the word 'lien' nor did he do so

---

[2] *Ibid.*

> in his written objection to the application filed by the Bank for vacating that order. To say the least rule of pleading does not warrant it.'

2. ***Bailee's right of general lien:*** This special right of lien is not given to all bailees, but this is available to specified types of bailees under certain circumstances. This general right of lien must be distinguished from the earlier particular lien. This one is wider than the particular lien. Because, general lien confers a right to retain any goods for any remuneration due from the bailor out of any goods bailed to him. Here the goods retained and the goods in respect of which the service is rendered need not be identical. Thus, if the bailee has this right of general lien, he can retain any property kept in his custody till payment of remuneration due out of any other goods bailed to him. Section 171 deals with this right of general lien which says—

> Bankers, factors, wharfingers, advocate of the Supreme Court and policy-brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect.

Thus it appears that if there is no contract to the contrary this right will be available to the following categories of bailee—

(a) Bankers;
(b) Factors;
(c) Wharfingers;
(d) Advocate of the Supreme Court;
(e) Policy brokers;

(f) Any other person who has an express contract to that effect.

In *Sonali Bank Vs. Bengal Liner Ltd* [1] money was held as a species of goods over which lien may be exercised. Where a banker has advanced money to another, he has a lien on all securities which come within his hand for the amount of his general balance unless there is an express contract to the contrary.[2]

It was observed in *Rupali Bank Vs. Haji Ahmed Sabur*[3] that—

> 'Depositor's money with the bank is not in the nature of any goods bailed to the bank ... ... Money deposited by the plaintiff in his account cannot be retained by the bank for the simple reason that by the said deposit a relationship of debtor and creditor is established between the bank and its customer and the bank can use the money in any manner it likes as the ownership in such deposit vests in the bank and there is no question of exercising lien on the money over which the bank has absolute right of ownership and possession ... ... The bank could not withhold the money deposited by the plaintiff with the defendant No. 1 in exercise of its right of general lien.'

3. ***Right regarding delivery of goods to one of several joint bailors:*** If more than one joint owners bail their goods to bailee then he may deliver them back to any one of joint owners provided that there is no contrary agreement to it is found. Section 165 says—

> If several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one

---

[1] (1989) 42 DLR 487.
[2] *Ibid.*
[3] (1991) 43 DLR 464.

> joint owner without the consent of all, in the absence of any agreement to the contrary.

Thus the law gives an option to the bailor in case of joint owners of the goods bailed that he can return it back to any one of them. But if any contrary agreement is entered into between them then that agreement will prevail and this option will be lost.

4. ***Right regarding delivery of goods to bailor without title:*** Sometimes it may happen that the bailor in fact does not have any title to the goods bailed and if in such a case the bailee delivers it back to the bailor or disposes of the goods as per the directions given by the bailor, then the bailee will have no liability to the actual owner of the goods for delivering it to the bailor who did not have any title to it. Section 166 says—

> If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the directions of, the bailor, the bailee is not responsible to the owner in respect of such delivery.

Thus the law gives the bailor an indemnity and in such a case the bailee enjoys the right to deliver it back to the bailor or to dispose of it according to the directions of the said bailor who does not have any title to it actually.

5. ***Right to claim damages for non-disclosure of the faults in the goods bailed:*** The bailor has a general duty to disclose the faults of the goods bailed. Section 150 says—

> The bailer is bound to disclose to the bailee faults in the goods bailed, of which the bailer is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and if he does not make such

disclosure, he is responsible for damage arising to the bailee directly from such faults.

If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.

Illustrations

(a) A lends a horse, which he knows to be vicious, to B. He does not disclose the fact that the horse is vicious. The horse runs away. B is thrown and injured. A is responsible to B for damage sustained.

(b) A hires a carriage of B. The carriage is unsafe, though B is not aware of it, and A is injured. B is responsible to A for the injury.

Thus the *first paragraph* to section 150 imposes the duty upon the bailor to disclose the faults in the goods of which he has the knowledge and the faults in the goods materially interfere with the use of them or expose the bailee to extraordinary risks. If the bailor does not make such disclosure as required by section 150 then the bailee may claim damages arising to him directly from such faults.

Second paragraph to section 150 imposes a strict liability on the bailor in a special case which says that if the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed. Thus in case of bailment for hire the bailee has the right to claim damages for every loss suffered by him due to the non-disclosure of the faults in the goods bailed whether that fault was known to the bailor or not.

6. ***Right to claim payment for necessary expenses:*** Section 158 gives the bailee the right to claim necessary expenses incurred by him in case of non-gratuitous bailment. It says—

> Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

7. ***Right to be indemnified by the bailor:*** Section 164 gives the bailee the right to be indemnified by the bailor which lays down that if the bailor does not have any legal right to make a bailment, but he does so without lawful authority over the goods bailed, then the bailee can claim any compensation for loss suffered by him due to that unauthorized bailment. It says—

> The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods or to give directions, respecting them.

8. ***Right to claim compensation for safe custody:*** If the bailor does not receives back the goods and the bailee in consequence of it suffers any loss then the bailor is bound to make good the loss suffered by such bailee. Thus, if a person does not take his dress from the tailor after the date of delivery then the bailee can lawfully claim the compensation from the bailor for safe custody.

Duties of bailee

1. ***Duty of care:*** The law imposes a duty upon the bailee to take care of the goods bailed to him. Now question

arises what will be the degree of that care to be taken by the bailee? Section 151 deals with this particular issue which says—

> In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

Thus it appears from above section that the bailee is under an obligation to take care of the goods like a person takes care of his own goods. The law says that his care will be identical to the care taken by a man of ordinary prudence under similar circumstances in case of his own goods. It was affirmed in *D. P. Goenka Vs. Governor General of Pakistan* that the care which a bailee is bound to take is co-extensive with that of man of ordinary prudence.[1] So, the bailee is not bound to take any extra ordinary care which a man of ordinary prudence would not take of his own goods under similar circumstances. The bailee will not be liable if any loss is caused even after taking the proper care as desired by section 151 unless any special contract to the contrary to it is found. Section 152 says—

> The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151.

Thus it was held in *Chittagong Port Authority Vs. Hongkong Shipping Lines*[2] that 'the Port Authority is not liable for any loss in this case as they informed the

[1] (1955) 7 DLR 134.
[2] (1989) 41 DLR 332.

owner of goods to locate the same. In this case as the owner of the drums did not remove the same from the jetty premises, without any fault on the part of the Jetty Administration, within clear 7 days from the time of landing of the drums in question the Jetty Administration is not liable for any loss as in this case the Port Authority informed the owners of the drums to find out the same and there was no fault on the part of the Port Authority to locate the goods.'[1]

It was held in *M/s. Jamiruddin Pradhan Vs. Federation of Pakistan*[2] that the liability of a railway while carrying goods entrusted to it is similar to the liability of a bailee. It was observed in *Chairman, Rly Board Vs. Commerce Bank Ltd.*[3] that—

> 'The Railway carries goods delivered to it as a bailee and is bound to take such care of the goods as that of a man of ordinary prudence. It is only when it wants to limit its liability that it can enter into special contract with the parties concerned.
>
> It appears from the records that the booking clerk, one Mr. Ismail Howlader, was in the employment of the appellant and while discharging his official duties in the capacity of booking clerk delivered the goods in question to a third party. In view of the facts, circumstance, evidence and decision referred to above we are of the opinion, that the defendant-appellant is absolutely liable for the act done by the booking clerk under his employment.'

It was held in *Chittagong Port Authority Vs. Md. Ishaque*[4] that the goods (for import or export) when remain in possession

---

[1] *Ibid.*
[2] (1957) 9DLR 99.
[3] (1994) 46 DLR 254.
[4] (1983) 35 DLR (AD) 364.

of the bailee (here the Chittagong Port authority), the later is liable as a bailee under the Contract Act (*vide* sections 151, 161). The Port Authority when receives the goods, from the ship, it receives them (as an agent) for delivery to the consignee and in this process it acts as bailee and therefore is liable to the consignee as provided in sections 151, 152 and 161 of the Contract Act.[5] It has been settled in *Pakistan Vs. M/s. Adamjee Jute Mills Ltd.*[6] that the consignor is ordinarily entitled to sue the carrier (Railway) for any loss or damage sustained by him due to negligence or default of the carrier but in certain circumstances a consignee who acquired title to the property by virtue of endorsement or otherwise of any document or is a party to the contract of consignment is also entitled to sue the carrier.

In was observed in *Central Bank of India Ltd. Vs. Messrs Jan Muahammad Haji Ismail* [7] that—

> 'Responsibility of the pledgee to take due care of the goods entrusted to its care does not disappear even though in terms of a special agreement the pledgee is absolved from every loss by theft, etc unless the pledgee discharges the onus of showing that theft takes place in spite of due care taken by it for the due safety of the goods lost by theft.
>
> It is no doubt true that the contracting parties may enter into a contract on terms special if they are not contrary to the provisions of section 23 of the Contract Act and they shall be bound by the terms of such agreement. But a party seeking cover under such a special term must first establish that any of the clauses of the said special contract is attracted to the case.

---

[5] *Ibid.*
[6] (1970) 22 DLR 741.
[7] (1965) 17 DLR 582.

> In the present case, the defendant Bank when seeking to rely on the terms of agreement from being excused from any liability of the pledged goods lost by theft, must firs prove satisfactorily that the theft was committed by a person or persons other than the agent or employees of the bank and the theft was committed in spite of the pledgee Bank having taken proper protection with regard to the safety of the goods. This, the pledgee Bank must do as even when a special agreement of this nature is entered into between the parties, failure of the party seeking cover under special term must attract the provisions of sections 151 and 152 of the Contract Act.
>
> In the present case, the defendant Bank has failed to establish the case of theft by third party of the goods pledged by the plaintiff firm with it and therefore the defendant Bank cannot escape the liability contemplated by sections 151 and 152 of the Contract Act.
>
> The defendant Bank, has after the theft was committed, attempted to lay the blame at the door of the plaintiff firm for having not engaged a *Darwan* themselves to look after the safety of the pledged goods as they had after pledging the goods handed over the possession of the *godown* to the Bank and did not even retain the duplicate key of the lock for them to inspect or jointly control the *godown*. They had also agreed to pay the salary of the *godown* keeper.'

2. ***Using the goods according to the conditions of bailment:*** The bailee is under an absolute obligation to use the goods as directed by the bailor and any type of unauthorized use is prohibited and if he makes so he will be strictly liable to the bailor for such an unauthorized use of the goods bailed to him. Section 154 says—

> If the bailee makes any use of the goods bailed, which is not according to the conditions of the bailment, he is liable

to make compensation to the bailor for any damage arising to the goods from or during such use of them.

Illustrations

(a) A lends a horse to B for his own riding only. B allows C, a member of his family, to ride the horse. C rides with care, but the horse accidentally falls and is injured. B is liable to make compensation to A for the injury done to the horse.

(b) A hires a horse in Dhaka from B expressly to march to Tangail. A rides with due care, but marches to Narayanganj instead. The horse accidentally falls and is injured. A is liable to make compensation to B for the injury to the horse.

Thus the liability for unauthorized use is strict one which will be imposed upon him irrespective of any negligence on his part.

3. *No mixture without bailor's consent:* The bailee can not on principle mix the goods bailed to him with his own goods without bailor's consent. But obviously if mixture is done with the consent of the bailor then section 155 says that the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced. Sections 156 and 157 lay down the following two clear rules regarding the effect of mixture without consent:

i. *Mixture of the goods which can be separated:* Section 156 says—

> If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the

property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture.

Illustration

A bails 100 bales of cotton with a particular mark to B. B, without A's consent, mixes the 100 bales with other bales of his own, bearing a different mark. A is entitled to have his 100 bales returned, and B is bound to bear all the expense incurred in the separation of the bales, and any other incidental damage.

ii. Mixture of the goods which can not be separated

Section 157 says—

If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

Illustration

A bails a barrel of Cape flour worth Taka 45 to B. B, without A's consent, mixes the flour with country flour of his own, worth only Taka 25 a barrel. B must compensate A for the loss of his flour.

4. ***Duty of return of goods:*** This is the most important duty of the bailee i.e. to return the goods to the bailee or dispose of it otherwise as directed by the bailor after the expiry of time or accomplishment of the purpose for

which the goods were bailed. Section 160 describes this duty in clear terms which says—

> It is the duty of the bailee to return, or deliver the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished.

If the bailee does not fulfill this duty then he will be responsible for any loss suffered by the bailor. This consequence of non-compliance of above duty has been mentioned in section 161, which says—

> If, by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time.

5. ***Duty to deliver any increase or profit:*** The goods bailed to the bailee may have any increase or profit gained during the continuance of bailment and in such case of any accretion to it the question arises that who will be the owner of such accretion. Law says that generally the bailor will be treated as its owner and so that it has to be returned by the bailee to the bailor unless there is any contract to the contrary. Section 163 says—

> In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

Illustration

A leaves a cow in the custody of B to be taken care of. The cow has a calf. B is bound to deliver the calf as well as the cow to A.

Rights of bailor:

1. ***Right to claim compensation for non-delivery of goods at proper time:*** The bailor will have a right to claim compensation if the goods bailed are not delivered at the proper time due to the default of the bailee. Section 161 imposes a clear obligation in this regard upon the bailee from which this right to claim compensation by the bailor arises.

2. ***Right to terminate the bailment:*** The bailee cannot make any use of the goods bailed, which is not authorized by the bailor. So, if he does so then the bailor will have the right to terminate the contract. Section 153 says—

> A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.
>
> *Illustration*
>
> A lets to B, for hire, a horse for his own riding. B drives the horse in his carriage. This is, at the option of A, a termination of the bailment.

Thus the law declares a contract of bailment as voidable when the bailee does anything which is inconsistent with the conditions of bailment. Voidable contract always means that its validity will be dependent at the will of one of the parties to the contract and not at the option of other or others and here the law gives this option to the bailor. Thus the bailor is at liberty to terminate the contract of bailment where the bailee has done anything which is inconsistent with the conditions of the said bailment.

3. ***Right to demand return of goods:*** The bailor obviously has a right to demand the goods bailed after a certain time. But section 159 says that the lender of a thing for use may at any time require its return, if the loan was gratuitous, even though he lent it for a specified time or purpose. In doing so sometimes he has to compensate the other party which has been discussed earlier under the heading of bailor's duties.

4. ***Right to claim compensation:*** The law imposes certain duties upon the bailee to take care of the goods bailed to him as discussed above and if the bailee fails to perform the above duties then the bailor will have the following corresponding right to claim compensation:

   i. *Section 151* imposes a duty of care upon the bailee and if he fails to do so then the bailor will have the right to claim compensation for any loss caused to the goods bailed due to the negligence of the bailee.

   ii. *Section 154* implies that if the bailee makes any use of the goods bailed, which is not according to the conditions of the bailment, then the bailor will have the right to claim compensation for any damage arising to the goods from or during such use of them.

   iii. *Section 156* lays down that if the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailor will have the right to claim the expense of separation or division, and any damage arising from the mixture.

iv. *Section 157* lays down that if the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

5. ***Right to claim return of goods:*** Section 160 imposes a duty upon the bailee to return the goods to the bailor or dispose of it otherwise as directed by the bailor, without demand, after the expiry of time or accomplishment of the purpose for which the goods were bailed. Thus the bailee is bound to return back the goods at proper time without even any demand made by the bailor and if he fails to do so then obviously the bailor will have a corresponding right to claim it from the bailee.

6. ***Right to claim any increase or profit:*** Section 163 implies that in the absence of any contract to the contrary, the bailor will have the right to claim any increase or profit which may have accrued from the goods bailed.

Rights of bailors and bailees against wrong doers:

The rights of bailors and bailees against wrong doers may be described under the following two headings:

1. ***Suit against wrong doer:***

Section 180 says—

> If a third person wrongfully deprives the bailee of the use of possession of the goods bailed, or does them any injury, the bailee is entitled to use such

remedies as the owner might have used in the like case if no bailment had been made; and either the bailor of the bailee may bring a suit against a third person for such deprivation of injury.

Apportionment of relief or compensation:

Section 181 says—

Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.

Termination of bailment:

A bailment may be terminated by the following modes:

1. *Expiry of time:* If the bailment is made for a specified time then it will be terminated after the expiry of that stipulated time.

2. *Fulfillment of object:* If the bailment is made for a specific purpose then it will be terminated after the accomplishment of that purpose.

3. *Option of the bailor:* By exercising the option of the bailor bailment may be terminated under the following two circumstances:

    i. *If the bailee does any unauthorized act:* Section 153 implies that if the bailee does anything which is inconsistent with the conditions of bailment then the bailor may terminate the bailment.

    ii. *Gratuitous bailment:* Section 159 implies that in case of gratuitous bailment it can be terminated at any time at the will of the bailor, even before the

expiry of the specified time or before the accomplishment of the purpose of bailment.

4. ***By operation of law:*** Section 162 says that a gratuitous bailment is terminated by the death of the bailor or bailee.

Laws relating to Pledge:

What is pledge? Section 172says—

> The bailment of goods as security for payment of a debt or performance of a promise is called "pledge".

Thus it appears that pledge is a special type of bailment where the goods are kept as security for either of the following two purposes:

i. Payment of a debt;

ii. Performance of a promise.

Section 172 further adds that the bailor is in this case called the "pawnor" and the bailee is called the "pawnee."

Pawnee's right of retainer: Section 173 says

> The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

Thus this section enables the pawnee to retain the goods pledged for the following purposes:

i. Payment of the debt;

ii. Performance of the promise;

iii. For the interest of the debt;

iv. For all necessary expenses incurred by him—

(a) in respect of the possession; or

(b) for the preservation of the goods pledged.

Pawnee not to retain for debt or promise other than that for which goods pledged: Presumption in case of subsequent advances: Section 174 says—

> The pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged: but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee.

Thus this section restricts the right of pawnee to retain the goods pledged and lays down the following three principles:

i. That the goods kept against one debt cannot be retained to realize anything out of another debt.

ii. But it is permitted only when a contrary contract to that effect is found.

iii. At the same time law speaks about the presumption of the existence of such contrary contract saying that such contract, in the absence of anything to the contrary,

shall be presumed in regard to subsequent advances made by the pawnee.

Pawnee's right as to extraordinary expenses incurred: Section 175 says—

> The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.

Thus, under certain circumstances, it may happen that for preservation of the goods pledged pawnee had to do something and if he does so which involves any monetary expenditure then obviously the pawnor will be bound to give the necessary expenses incurred by him. This right of the pawnee to receive the extraordinary expenses incurred by him has been guaranteed by this section. This is termed as extraordinary expenses because it was not settled or foreseen exactly at the time of pledge, rather it has been occurred due to any extraordinary circumstance.

Pawnee's right where pawnor makes default: Section 176 says—

> If the pawnor makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.
>
> If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

Thus this section deals with the rights of the pawnee in case of the default of the pawnor. If the pawnor fails to pay the debt or perform the promise in time, in respect of which the goods were pledged, the pawnee will have the following rights:

1) He may bring a suit against the pawnor upon the debt or promise; and

2) At the same time he may retain the goods pledged as a collateral security; or

3) He may sell the thing pledged. In case of such sale three more rules are there—

   i. A reasonable notice of such sale is to be given to the pawnor.

   ii. If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance.

   iii. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

Pawnee's right to sue and right to retention are two alternative remedies though it is not mentioned clearly as such by the Act. It has been observed in *Bengal Metro Engineering Co. Vs. Agrani Bank*[1] that—

> 'For realisation of payment of debt or pawn there is no bar to institute a proper suit by the pawnee and at the same

[1] (1994) 46 DLR 168.

> time to retain the pledged goods, if any, in his custody as a collateral security. But the two relieves though concurrent, are yet alternative and both cannot be resorted to at a time.'

It was observed in *Md. Obaidul Akbar Vs. East Pakistan Co-operative Bank* [1] that—

> 'Right of sale which has been conferred upon the pawnee by the section 170 of the Contract Act arises on default of the pawnor in payment of the debt at the stipulated time of the promise and after the accrual of the right to sell, the pawnee shall have to give a reasonable notice of the sale and not merely an intention to sell.
>
> Language of section 176 is sufficiently clear to indicate that what the pawnee is required under this provision is give a reasonable notice of the sale and not a notice of the mere intention to sell. To read intention to sell in place of the sale is reading something in the statute which is not there and according to the well established canon of interpretation of statute such a manner of reading is very much disapproved.
>
> Expression 'reasonable notice of the sale' as used in section 176 of the Contract Act, includes information about the time and place of the actual sale of the pawned goods, and any sale of such goods held without serving a notice containing the particular as to the time and place of the sale is not a valid sale binding upon the pawnor.
>
> The use of the word 'reasonable' before the word notice as used in section 176 clearly points out, that such a notice cannot mean merely a notice of the creditor's intention to sell the debtor's property without giving the owner an opportunity to watch over the proceeding of the sale in order to safeguard his own interest.

---

[1] (1975) 27 DLR 523.

> The pawnor having have the right conferred by section 177 to redeem his property at any time before the actual sale, it seems to us that the Legislature intended that the pawnor should be apprised of the actual sale of his property.'

Defaulting pawnor's right to redeem: Section 177 says—

> If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them; but he must, in that case, pay, in addition, any expenses which have arisen from his default.

Pledge by mercantile agent: Section 178 says—

> Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorized by the owner off the goods to make the same; provided that the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has not authority to pledge.
>
> *Explanation.*- In this section the expressions 'mercantile agent' and 'document of title' shall have the meanings assigned to them in the Sale of Goods Act, 1930.

Pledge by person in possession under voidable contract: Section 178A says—

When the pawnor has obtained possession of the goods pledged by him under a contract voidable under section 19 or Section 19A, but the contract has not been rescinded at the time of the pledge, the pawnee acquires a good title to the goods, provided he acts in good faith and without notice of the pawnor's defect of title.

Validity of pledge where pawnor has only a limited interest: section 179 says—

> Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

Laws relating to finder of goods:

Responsibility of finder of goods: Section 71 simply lays down that—

> A person who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as bailee.

Two more sections deal expressly with the law relating to finder of goods. They are—

Right of finder of goods; may sue for specific reward offered: Section 168 says—

> The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner, but he may retain the goods against the owner until he receives such compensation; and, where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it.

When finder of thing commonly on sale may sell it: Section 169 says—

> When a thing which is commonly the subject of sale is lost, if the owner cannot with reasonable diligence

be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it—

1) When the thing is in danger of perishing or of losing the greater part of its value, or,

2) When the lawful charges of the finder, in respect of the thing found, amount to two thirds of its value.

CHAPTER 14

AGENCY

Appointment and Authority of Agents:

It is interesting to note here that the Contract Act, 1872, does not define the term 'agency' directly. But after analyzing the definitions of 'agent' and 'principal' given by the Act[1] one can easily be able to find out the constituent elements of 'agency'.

Who is an agent? Section 182 of the Contract Act, 1872, says that an "agent" is a person employed to do any act for another or to represent another in dealings with third persons. Thus the following elements of an agent are found:

I. An agent is a person.

II. He is employed by another person

III. The purpose of such employment will be either of the following two, i.e., —

   i. To do any act for another (employer of the agent); or

   ii. Representing another in dealings with third person.

[1] Section 182, the Contract Act, 1872.

Who is a 'principal'? Section 182 also deals with the definition of principal which says that the person for whom an act is done, or who is so represented, is called "principal". Thus this definition of 'principal' must be understood together with the definition provided to mean an 'agent' as because this is in fact an extension of that definition. As it has been said in the definition of an agent that he is a person who does the act of another person or represents that person and the person whose act is so being done or he who is so represented by an agent is called the principal.

What is 'agency'? It has been mentioned earlier that the Contract Act, 1872 does not give any definition of 'agency' in clear terms. But it may be concluded that 'agency' is a legal device by which the above relationship, i.e., the relationship of principal and agent, is created. An important feature of agency is evident in the above two definitions of agent and principal, that is, the agent must have an authority to do any act for another person or he must have an authority to represent another and the existence of agency may be tested by examining the existence of such authority in the hands of the agent.

Who may employ an agent? The answer to this question lies, in fact, in the description of the qualifications required to be the principal as he is the person who employs an agent. Section 183 says—

> any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.

Thus, only the person who has the following qualifications is capable to employ an agent, or in other words, to become a principal:

i. The person must attain the age of majority according to the law to which he is subject. In Bangladesh, the applicable law is the Majority Act, 1875, which fixes the age of majority generally as 18 years. Thus to employ an agent one must be a person who is at least 18 years old.

ii. He must be a person of sound mind. The criteria of sound mind have been described in section 12 earlier and accordingly it is basically the ability of understanding the impact of one transaction upon his own interest.

Thus the person who has the above two qualifications is capable to employ an agent.

Who may be an agent? For the purpose of determining the qualifications of an agent the law lays down two principles. One permits any one to be appointed as an agent and the other requires to have certain qualifications. Section 184 deals with this particular issue which says—

> As between the principal and third persons any person may become an agent, but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained.

Thus it appears that to be an agent between the principal and third person no qualification is required but to make the agent responsible to his principal that agent must have the following qualifications—

i. He must attain the age of majority; and

ii. He must be a person of sound mind.

Thus the person who does not have the above two qualifications may be appointed as an agent as between the

principal and third person but to make that agent accountable to the principal lawfully he must have these qualifications.

Necessity of consideration: Section 185 makes it absolutely clear that no consideration is essential for the creation of an agency which says very simply—

'No consideration is necessary to create an agency'.

Thus, this is the distinguishing feature of agency which makes it different from ordinary contracts.

Agent's authority:

Nature of the agent's authority: Agent's authority may be of two types which have been mentioned in section 186 which says—

The authority of an agent may be expressed or implied.

Thus it appears that an agent may have the following two types of authorities:

i. Express authority;

ii. Implied authority.

What is express authority? Section 187 defines it in clear terms that 'an authority is said to be expressed when it is given by words spoken or written.'

What is implied authority? Section 187 defines implied authority by saying that 'an authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.' Section 187 further adds the following illustration to make the concept of implied authority more clear. The illustration is as follows:

> A owns a shop in Mymensingh, living himself in Dhaka and visiting the shop occasionally. The shop is managed by B, and he is in the habit of ordering goods from C in the name of A for the purposes of the shop, and of paying for them out of A's funds with A's knowledge. B has an implied authority from A to order goods from C in the name of A for the purposes of the shop.

Extent of agent's authority: The extent of agent's authority has been described in section 188 adding two illustrations with it. Section 188 says—

> An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act.
>
> An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purposes, or usually done in the course of conducting such business.
>
> *Illustrations*
>
> (a) A is employed by B, residing in London, to recover at Chittagong, a debt due to B. A may adopt any legal process necessary for the purpose of recovering the debt, and may give a valid discharge for the same.
>
> (b) A constitutes B his agent to carry on his business of a ship-builder. B may purchase timber and other materials, and hire workmen, for the purposes of carrying on the business.

Thus it appears that the agent's authority is limited up to the lawful thing. It has been clearly indicated that the agent does not have the authority to do any illegal act though that becomes necessary for the agency or for the beneficial interest of the principal. Again by using the terms *'every lawful act,'* it is not the intention of law to authorize the

agent doing everything in practice, rather the intention of the legislator is to permit the agent doing every lawful act which is reasonably required to do. And what is 'reasonably required' is obviously a question of fact.

Agent's authority in an emergency: Apart from the above authorization, the law gives an agent a special authority in case of an emergency. Section 189 says—

> An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances.
>
> *Illustrations*
>
> (a) An agent for sale may have goods repaired if it be necessary.
>
> (b) A consigns provisions to B at Chittagong, with directions to send them immediately to C at Dhaka, B may sell the provisions at Chittagong if they will not bear the journey to Dhaka without spoiling.

Thus section 189 gives a wide range of power to the agent which empowers him to do everything in an emergency provided that is done—

i. To protect his principal from loss, and

ii. the same thing would be done by a person of ordinary prudence, in his own case, under similar circumstances.

Thus the law sets the reasonableness as the test of authority in an emergency.

Laws relating to sub-agent:

Delegation of agency: Generally an agent cannot delegate his agency to someone else which he agreed to do. But obviously under certain circumstances law permits such delegation subject to the satisfaction of some conditions. Section 190 says—

> An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or from the nature of the agency, a sub-agent must, be employed.

Thus it appears that what the agent agreed to do personally cannot be delegated to another person by creating a sub-agent, but he can appoint such a sub-agent to delegate his authority if he can prove that—

i. Ordinary custom of trade requires such a sub-agent to be employed under the similar circumstances; or

ii. The nature of the agency itself requires the appointment of such a sub-agent.

Who is a sub-agent? Section 191 defines sub-agent in the following words—

> A "Sub-agent" is a person employed by, and acting under the control of, the original agent in the business of the agency.

So, the conditions are of two-folds:

i. He must be employed by the original agent.

ii. He must act under the control of the original agent.

Thus, if A appoints B as his agent and B appoints C to do some of his jobs, then C will not be treated as a sub-agent. Because, to be a sub-agent one must be appointed and as well as must act under the control of the original agent in the business of the agency, otherwise he will not be treated as sub-agent by law.

Legal consequences of appointment of sub-agents properly:

An agent may appoint a sub-agent under the authority of the original principal, or he may do it in his own authority without being authorized by the principal. In these two cases legal consequences differ grossly. Section 192 deals with the legal consequences of appointment of sub-agents from various dimensions if the sub-agent is appointed properly. Section 192 says—

> Where a sub-agent is properly appointed, the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for his acts, as if he were an agent originally appointed by the principal.
>
> The agent is responsible to the principal for the acts of the sub-agent.
> The sub-agent is responsible for his acts to the agent, but not to the principal, except in case of fraud or willful wrong.

Thus this section deals with the following three consequences of appointment of sub-agents properly:

1) *Representation of principal by sub-agent properly appointed:* The first paragraph to section 192 clearly lays down that if anything is done by any sub-agent appointed properly, then as regards the third party the original

principal will be bound and responsible for every act done by the sub-agent.

2) *Agent's responsibility for sub-agent:* The second paragraph to section 192 deals with agent's responsibility for the acts of sub-agent which says that the agent will be responsible to the principal for the acts of sub-agent. Thus though the principal will be responsible to the third party for the acts done by sub-agent, but the principal still may make the agent responsible to him for those acts for which he was responsible to third party. It appears, in fact, that the rule in the first paragraph is made for the better protection of third party rights.

3) *Sub-agent's responsibility:* The third paragraph to section 192 deals with the following two types of responsibilities of sub-agent—

   i. *Liability to the agent:* Generally the sub-agent is responsible for his all acts to the agent and not to the principal.

   ii. *Liability to the principal:* This is an exception to the general rule which says that the sub-agent will be responsible to the principal only for fraud or willful wrong done by him.

Legal consequences of appointment of sub-agent without authority: Section 193 deals with the provisions relating to the responsibility of the principal and agent for the acts of the sub-agent if he is appointed without authority. It says—

> Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, the agent stands towards such person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons; the principal is not represented by or

> responsible for the acts of the person so employed, nor is that person responsible to the principal.

Thus, regarding the appointment of sub-agent without authority, the above section lays down the following rules:

i. The agent who appointed the later one will be treated as the principal in relation to that person.

ii. Such a sub-agent is responsible for his acts both to the principal and to third persons.

iii. The original principal is not represented by that appointed person.

iv. The principal is not responsible for the acts of the person so employed.

v. Even the person so employed will not be responsible to the original principal, rather his responsibility will be confined to the third person and the person who appointed him.

Relationship between principal and person duly appointed by agent to act in business of agency: If the principal authorizes his agent to name another person to act for the principal and the agent names so, then that later person will not be treated as a sub-agent, rather he will be treated as an agent of the principal to do that part of the job assigned for which he has been appointed. Section 194 says—

> Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

Illustrations

(a) A directs B, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. B names C, an auctioneer, to conduct the sale. C is not a sub-agent, but is A's agent for the conduct of the sale.

(b) A authorises B, a merchant in Chittagong, to recover the moneys due to A from C & Co. B instructs D, a solicitor, to take legal proceedings against C & Co. for the recovery of the money. D is not a sub-agent, but is solicitor for A.

Thus the above section removes the confusion which may arise regarding status of the person who has been appointed, after being named by the agent, being instructed to name so.

Agent's duty in naming such person: If the principal imposes a duty upon his agent to name another person to act for the principal then the agent cannot name any person as he pleases rather in naming so he has to exercise the same amount of discretion as a man of ordinary prudence as he would exercise in his own case. Section 195 says—

> In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and, if he does, this, he is not responsible to the principal for the acts or negligence of the agent so selected.

Illustrations

(a) A instructs B, a merchant, to buy a ship for him. B employs a ship surveyor of good reputation to choose a ship for A. The surveyor makes the choice negligently and the ship turns out to be unseaworthy, and is lost. B is not, but the surveyor is, responsible to A.

(b) A consigns goods to B, a merchant, for sale. B, in due course, employs an auctioneer in good credit to sell the goods of A, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. B is not responsible to A for the proceeds.

Thus the section lays down the following two principles regarding naming another person by the agent to act for the principal:

i. In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case.

ii. And if he does this he is not responsible to the principal for the acts or negligence of the agent so selected.

So, if it can be proved that the agent named another person negligently and did not exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case, he will be responsible to the principal for the acts or negligence of the agent so selected.

Implied Agency 2. form

Agency by Ratification:

If a person does anything on behalf of another person without being authorized by the later then at the first sight it will be decided that the person who does so is not an agent. In such a case if the later one ratifies it afterwards then the first person will be treated as his agent though originally he was simply a stranger. Thus an agency may be created by ratification. The rules regarding agency by ratification are as follows:

Right of person as to acts done for him without his authority: Effect of ratification: Section 196 says—

> Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratify them, the same effects will follow as if they had been performed by his authority.

Thus if any act is done by one person on behalf of another, but without his knowledge or authority, he will have two options:

i. He may ratify it ; or

ii. He may disown it.

If he disowns that act then he will have no liability for such act done by another person. But if he elects to ratify it then the same effects will follow as if they had been performed by his authority, i.e., an agency will be created there by such ratification.

Types/modes of ratification: Section 197 says—

> Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.
>
> *Illustrations*
>
> (a) A, without authority, buys goods for B. Afterwards B sells them to C on his own account. B's conduct implies a ratification of the purchase made for him by A.
>
> (b) A without B's authority, lends B's money to C. Afterwards B accepts interest on the money from C. B's conduct implies a ratification of the loan.

Thus it appears that the ratification may be of the following two types:

i. Express ratification;

ii. Implied ratification.

Knowledge is a requisite for valid ratification: Section 197 says—

> No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

Thus section 197 mentions the condition of a valid ratification and it lays down clearly that a person whose knowledge of the facts of the case is somehow materially defective cannot make a valid ratification. In other words, to ratify the act of one person the person who ratifies it must have a complete knowledge of the facts of the case which is not materially defective. Again, mere defective knowledge will not make him incapable to ratify but the defect must be material one and what is a materially defective knowledge is obviously a question of fact.

Effect of ratifying unauthorised act forming part of a transaction: What will happen if a person ratifies only one part of a transaction? Section 199 says—

> A person ratifying any unauthorized act done on his behalf ratifies the whole of the transaction of which such act formed a part.

Thus a person cannot at his own sweet will ratify part of a transaction and repudiate the rest. So, if a person ratifies any unauthorized act does on his behalf it will amount to ratification not only of that part rather the whole transaction will be deemed to be ratified.

Ratification and third party rights: On principle, ratification of unauthorized act cannot be done in the way which injures the third person. Section 200 says—

> An act done by one person on behalf of another, without such other person's authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect.
>
> *Illustrations*
>
> (a) A, not being authorized thereto by B, demands on behalf of B, the delivery of a chattel, the property of B, from C, who is in possession of it. This demand cannot be ratified by B, so as to make C liable for damages for his refusal to deliver.
>
> (b) A holds a lease from B terminable on three months' notice. C, an unauthorized person, gives notice of termination to A. The notice cannot be ratified by B, so as to be binding on A.

Thus this section gives a protection to third parties that a ratification of an unauthorized act cannot be done if that injures any third person.

❑ Revocation of Authority:

Termination of agency: The different modes of termination of agency have been described in section 201 which says—

> An agency is terminated by the principal revoking his authority; or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an

> insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.

Thus it appear that an agency may be terminated in the following modes:

1. By the act of the principal if he revokes his authority.
2. By the act of the agent if he renounces the business of the agency.
3. By the completion of business of the agency.
4. By the death of principal.
5. By the death of agent.
6. If the principal becomes person of unsound mind.
7. If the agent becomes person of unsound mind.
8. If the principal is adjudicated as an insolvent under the provisions of any Act for the time being in force.

The termination of agency again is guided by the following rules enunciated in sections 202—210. The whole series of termination of agency is discussed hereafter:

Where agent has an interest in subject-matter: Section 202 says—

> Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.
>
> *Illustrations*
>
> (a) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him

from A. A cannot revoke this authority nor can it be; terminated by his insanity or death.

(b) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself, out of the price, the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or death.

This section deals with the termination of a special type of agency where the agent has an interest in the property which forms the subject-matter of the agency. In such a case, the agency cannot be terminated to the prejudice of such interest unless there is an express contract to that effect.

When principal may revoke agent's authority: Section 203 deals with the time for revocation of agent's authority to be made by the principal. It says—

> The principal may, save as is otherwise provided by the last preceding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.

Thus it appears from the above section that once an authority is given to an agent that does not necessarily mean that the principal cannot revoke it later on. The law says that the principal will be at liberty to revoke the authority granted to his agent provided that that must be done before the authority has been exercised so as to bind the principal. In doing so the principal's power of revocation will be restricted by the provisions of the earlier sections, i.e., the principal can not revoke the authority if the agent becomes an interested party there unless there is an express contract to that effect.

The Court observed in *Abdun Naim Parvez (Md) Vs. Sachindra Kumar Mandal and others*[1] that—

> 'Where the agent has himself an interest in the property forming subject matter of the agency, as provided by sections 202 and 203 of the Contract Act, cannot be terminated to the prejudice of such interest in the absence of an express contract. In the present case, from the recital of the power of attorney it appears that the agent himself has an interest in the property and hence such agency cannot be revoked unilaterally to the prejudice of such interest.'

Revocation where authority has been partly exercised: If the agent has already done a part of the authorized transaction then the principal cannot revoke the authority so far as regards such acts and obligations as arise from acts already done in the agency. Section 204 says—

> The principal cannot revoke the authority given to his agent after the authority has been partly exercised so far as regards such acts and obligations as arise from acts already done in the agency.
>
> *Illustrations*
>
> (a) A authorises B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's money remaining in B's hands. B buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton.
>
> (b) A authorises B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's moneys remaining in B's hands. B buys 1,000 bales of cotton in A's name and so as not to render himself personally liable for

[1] 5 BLC 14.

> the price. A can revoke B's authority to pay for the cotton.

Thus, if a principal employs an agent to do something which, by law, involves the agent in a legal liability or even in a customary liability by reason of usage in that class of transactions known to both agent and principal, the principal cannot draw back and leave the agent to bear the liability at his own expense.[1]

Compensation for revocation by principal or renunciation by agent: Section 205 says—

> Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, of the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

Thus if an agency is created for a specific time, then that cannot be revoked before the expiry of the time without showing sufficient cause. And if the principal does so then he is bound to make compensation to the agent for loss suffered by him by earlier revocation of agency. This similarly prevents the agent from renunciation of agency before the time if that was constituted for a particular period and if the agent does so, he has to compensate the principal for such earlier renunciation.

Notice of revocation or renunciation: For revocation or renunciation of agency by the principal or agent, as the case may be, a reasonable notice is required and that cannot be done suddenly. Section 206 says—

> Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to

---

[1] *Read v. Anderson* (1884) 13 Q.B. 779, 783.

> the principal or the agent, as the case may be, must be made good to the one by the other.

Thus if the principal or the agent does not give reasonable notice before revocation or renunciation, as the case may be, the party who does so must compensate the other party who suffered loss for not giving such notice as required by the law.

Revocation and renunciation may be expressed or implied: Section 207 is simple enough which deals with the modes of revocation and renunciation which says—

> Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively.
>
> *Illustration*
>
> A empowers B to let A's house. Afterwards A lets it himself. This is an implied revocation of B's authority.

When termination of agent's authority takes effect as to agent, and as to third persons: Section 208 says—

> The termination of the authority of an agent does not so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.
>
> *Illustrations*
>
> (a) A directs B to sell goods for him, and agrees to give B five per cent commission on the price fetched by the goods. A afterwards, by letter, revokes B's authority. B, after the letter is sent, but before he receives it, sells the goods for Taka 100. The sale is binding on A and B is entitled to Taka five as his commission.

(b) A, at Chittagong, by letter, directs B to sell for him some cotton lying in a warehouse in Khulna, and afterwards, by letter, revokes his authority to sell, and directs B to send the cotton to Chittagong. B, after receiving the second letter, enters into a contract with C, who knows of the first letter, but not of the second, for the sale to him of the cotton. C pays B the money, with which B absconds. C's payment is good as against A.

(c) A directs B, his agent, to pay certain money to C. A dies, and D takes out probate to his will. B, after A's death, but before hearing of it, pays the money to C. The payment is good as against D, the executor.

This section deals with the time from when termination of the authority of an agent will be effective. Thus it will not be operative at the moment it is terminated. But the law says that revocation by the act of the principal takes effect as to the agent from the time when the revocation is made known to him; and as to third persons when it is made known to them, and not before.

Agent's duty on termination of agency by principal's death or insanity: Section 209 clearly lays down agent's duty on termination of agency by principal's death or insanity which says—

> When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

Thus the law imposes a duty of care upon the agent at the death or unsoundness of the principal and the degree of care required is of 'reasonable standard' which is a question

of fact and probably it means standard of care as would be taken by a person of ordinary prudence in his own case under the similar circumstances.

Termination of sub-agent's authority: Section 210 says—

> The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.

Thus the section lays down the rule regarding the automatic termination of the authority of a sub-agent with the termination of the agency. So, if an agent's authority is terminated then the authority of all sub-agents appointed by him will be terminated automatically in consequence of the termination of agency.

Agent's Duty to Principal:

Agent's duty in conducting principal's business: Section 211 says—

> An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.
>
> *Illustrations*
>
> (a) A, an agent engaged in carrying on for B a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to

make such investments. A must make good to B the interest usually obtained by such investments.

(b) B, a broker, in whose business it is not the custom to sell on credit, sells goods of A, on credit to C, whose credit at the time was very high. C before payment, becomes insolvent. B must make good the loss to A.

How will the agent conduct the business of his principal?
This question has been answered in section 211. Law provides for two modes by which the agent has to conduct the business of his principal. They are as follows:

i. *An agency where the principal has given directions:* If the principal has given the directions then the agent is bound to conduct the business according to those directions.

ii. *An agency where the principal has not given directions:* If the principal does not give any direction then the agent has to conduct the business according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business.

Consequence of violation of above rules: The law adds further that if an agent does not conduct the business in any of the above manners, then the following two consequences will be there:

i. *Duty to compensate:* The agent must compensate the principal for any loss sustained for conducting the business of his principal at his sweet will without following the above instructions given by law.

ii. *Account for profit:* Moreover, even if any profit accrues in doing so, he must account for it.

Skill and diligence required from agent: Section 212 lays down a set of rules regarding the skill and diligence required from agent which says—

> An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct.

Illustrations

(a) A, a merchant in Chittagong, has an agent, B, in London to whom a sum of money is paid on A's account, with orders to remit. B retains the money for a considerable time. A, in consequence of not receiving the money, becomes insolvent. B is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct losses e.g., by variation of rate of exchange but not further.

(b) A, an agent for the sale of goods, having authority to sell on credit, sells to B on credit, without making the proper and usual inquiries as to the solvency of B. B, at the time of such sale, is insolvent. A must make compensation to his principal in respect of any loss thereby sustained.

(c) A, an insurance broker, employed by B to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing

can be recovered from the underwriters. A is bound to make good the loss to B.

(d) A, a merchant in England, directs B, his agent at Chittagong who accepts the agency, to send him 100 bales of cotton by a certain ship. B, having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. B is bound to make good to A, the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.

Thus the section lays down the following rules:

i. An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business.

ii. The agent will be excused from discharging his duty with above skill if he has actual want of that skill provided the principal has notice of such want of skill. So, if the principal does not have the notice of such want of skill then the agent will be liable irrespective of his actual skill and ability.

iii. The agent is always bound to act with reasonable diligence.

iv. The agent is also bound to use such skill as he possesses. It means that the agent must use best of his ability as he possesses.

v. The agent is liable to make compensation to his principal in respect of the direct consequence of his own neglect, want of skill or misconduct.

vi. But the agent does not have any liability and need not compensate the principal in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct. Thus the sole criterion to make the agent liable to pay compensation is the casual connection between the loss suffered and the want of skill, neglect or misconduct of the agent and it is to be shown that the loss is not the remote consequence of either of them but is one which is the direct result of his act.

Agent's accounts: Section 213 while dealing with an elementary duty of an agent says that—

> an agent is bound to render proper accounts to his principal on demand.

Thus the law gives the principal a right to demand the accounts from the agent at any time and the law imposes the obligation upon the agent to render proper accounts to his principal whenever such demand is made by him.

Agent's duty to communicate with principal: At some difficult situations the law imposes an obligation upon the agent to consult with his principal. Section 214 says—

> It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.

Thus in the difficult situations the agent is bound to communicate with his principal with his every honest ability and to seek instructions from him to face those difficult situations. In such difficult times law does not permit the agent to solve the problem in his own, rather it

imposes upon him a liability to consult with the principal and then to face the situation as per the instructions given by the principal.

Right of principal when agent deals on his own account, in business of agency without principal's consent: Section 215 says—

> If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.
>
> *Illustrations*
>
> (a) A directs B to sell A's estate. B buys the estate for himself in the name of C. A, on discovering that B has bought the estate for himself, may repudiate the sale, if he can show that B has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.
>
> (b) A directs B to sell A's estate. B, on looking over the estate before selling it, finds a mine on the estate which is unknown to A. B informs A that he wishes to buy the estate for himself, but conceals the discovery of the mine. A allows B to buy in ignorance of the existence of the mine. A on discovering that B knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

Thus the law gives the principal to repudiate a transaction subject to the satisfaction of the following conditions:

i. The agent deals on his own account in the business of the agency.

ii. The agent does so without first obtaining the consent of his principal.

iii. Even the agent does not acquaint the principal with all material circumstances which have come to his own knowledge on the subject.

iv. The case shows either that the agent has dishonestly concealed any material fact from him, or that the dealings of the agent have been disadvantageous to him.

Principal's right to benefit gained by agent dealing on his own account in business of agency: If the agent conducts business of his principal on his account and gains any benefit still the principal will have the right to claim that benefit gained by the agent in doing business on his own account. Section 216 says—

> If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.
>
> *Illustration*
>
> A directs B, his agent, to buy a certain house for him. B tells A it cannot be bought, and buys the house for himself. A may, on discovering that B has bought the house, compel him to sell it to A at the price he gave for it.

Agent's right of retainer out of sums received on principal's account: Section 217 says—

> An agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses

> properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.

Thus the above section gives the agent a special right to retain any sum received on principal's account for the following purposes:

i. Against all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business.

ii. For such remuneration as may be payable to him for acting as agent.

Agent's duty to pay sums received for principal: The agent is obviously bound to pay sums received for principal after legal deductions made from it. Section 218 lays down this principle clearly which says—

> Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

When agent's remuneration becomes due: Generally agent's remuneration becomes due after the completion of any act. But it may be so due if there is any contract to the contrary. Section 219 says—

> In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.

Thus section 219 lays down the following principles:

i. Payment for the performance of any act done by the agent becomes due after the completion of such act, and not before. But if there is any contract to the contrary then the payment may be due even after part performance made by the agent.

ii. An agent have a special right to detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.

Agent is not entitled to remuneration for business misconducted: This is absolutely a logical rule that the agent will not be paid remuneration for business misconducted. Section 220 says—

> An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business which he has misconducted.
>
> *Illustrations*
>
> (a) A employs B to recover 100,000 Taka from C and to lay it out on good security. B recovers the 100,000 Taka and lays out 90,000 Taka on good security, but lays out 10,000 Taka on security which he ought to have known to be bad, whereby A loses 2,000 Taka. B is entitled to remuneration for recovering the 100,000 Taka and for investing the 90,000 Taka. He is not entitled to any remuneration for investing the 10,000 Taka, and he must make good the 2,000 Taka to B [sic in the Act, but it should obviously be A.]

(b) A employs B to recover 1,000 Taka from C. Through B's misconduct the money is not recovered. B is entitled to no remuneration for his services, and must make good the loss.

Agent's lien on principal's property: Section 221 gives the agent a special right to lien for the amount due to himself. It says—

> In the absence of any contract to the contrary an agent is entitled to retain goods, papers and other property, whether moveable or immovable, of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him.

Principal's Duty to Agent:

Agent to be indemnified against consequences of lawful acts: An agent is given the right to be indemnified by the principal for any loss suffered by him in doing the authorized acts, provided that act must be lawful. Section 222 says—

> The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.
>
> *Illustrations*
>
> (a) B, at Singapore, under instructions from A at Chittagong, contracts with C to deliver certain goods to him. A does not send the goods to B and C sues B for breach of contract. B informs A of the suit, and A authorizes him to defend the suit. B defends the suit, and is compelled to pay damages and costs, and

incurs expenses. A is liable to B for such damages, costs, and expenses.

(b) B, a broker at Chittagong by the orders of A, a merchant there, contracts with C for the purchase of 10 casks of oil for A. Afterwards A refuses to receive the oil, and C sues B. B informs A, who repudiates the contracts altogether. B defends, but unsuccessfully, and has to pay damages and costs and incurs expenses. A is liable to B for such damages, costs, and expenses.

Agent to be indemnified against consequences of acts done in good faith: Section 223 says—

Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it cause an injury to the rights of third persons.

Illustrations

(a) A, a decree-holder and entitled to execution of B's goods, requires the officer of the Court to seize certain goods, representing them to be the goods of B. The officer seizes the goods, and is sued by C, the true owner of the goods. A is liable to indemnify the officer for the sum which he is compelled to pay to C in consequence of obeying A's directions.

(b) B, at the request of A, sells goods in the possession of A, but which A had no right to dispose of. B does not know this, and hands over the proceeds of the sale to A. Afterwards C, the true owner of the goods, sues B and recovers the value of the goods and costs. A is liable to indemnify B for what he has been compelled to pay to C, and for B's own expenses.

Thus the law gives the agent the right to be indemnified not only against authorized acts, but it gives also the right to be indemnified against all acts done in good faith.

Non-liability of employer of agent to do a criminal act: There will be no right on the part of the agent to be indemnified due to doing a criminal act though that was authorized by his principal. Section 224 says—

> Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.
>
> *Illustrations*
>
> (a) A employs B to beat C, and agrees to indemnify him against all consequences of the act. B thereupon beats C, and has to pay damages to C for so doing. A is not liable to indemnify B for those damages.
>
> (b) B, the proprietor of a newspaper, publishes, at A's request, a libel upon C in the paper, and A agrees to indemnify B against the consequences of the publication, and all costs and damages of any action in respect thereof. B is sued by C and has to pay damages, and also incurs expenses. A is not liable to B upon the indemnity.

Compensation to agent for injury caused by principal's neglect: If the agent suffers any loss due to neglect or want of skill of the principal then the principal will be bound to compensate the agent for such loss. Section 225 says—

> The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill.

Illustration

A employees B as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskillfully put up, and B is in consequence hurt. A must make compensation to B.

Effect of Agency on Contracts with Third Persons:

Enforcement and consequences of agent's contracts: All acts done by the agent within the scope of his authority or being ratified further by the principal, will be given the same legal status of the acts done by the principal, i.e., those will be deemed as if those acts have been done by the principal himself. Section 226 says—

> Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences; as if the contracts had been entered into and the acts done by the principal in person.

Illustrations

(a) A buys goods from B, knowing that he is an agent for their sale, but not knowing who is the principal. B's principal is the person entitled to claim from A the price of the goods, and A cannot, in a suit by the principal, set off against that claim a debt due to himself from B.

(b) A being B's agent, with authority to receive money on his behalf, receives from C a sum of money due to B. C is discharged of his obligation to pay the sum in question to B.

Principal's liability when agent exceeds authority: Sometimes the agent may exceed his authority and if he does anything

exceeding the authority, what will be the legal consequence of that act? This question has been answered in section 227 which says—

> When an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority is binding as between him and his principal.
>
> *Illustration*
>
> A, being owner of a ship and cargo, authorizes B to procure an insurance for 4,000 Taka on the ship. B procures a policy for 4,000 Taka on the ship, and another for the like sum on the cargo. A is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

Thus the section may be dissected as such—

i. The agent exceeds his authority and does something beyond his authority.

ii. The whole transaction is not beyond his authority, rather a part of it is within his authority.

iii. The authorized part of the act done by him is separable from the part which is unauthorized.

iv. Under such circumstance, only the authorized portion of his agent's act will bind the principal and the principal will have no liability for the unauthorized portion of his agent's task.

Thus it appears that even if the agent exceeds his authority then the principal cannot deny his liability absolutely rather he will be bound by the authorized portion of his agent's act

provided that that is separable from the unauthorized portion of the act done by him exceeding the authority.

Principal is not bound when excess of agent's authority is not separable: When the agent does anything exceeding his authority another situation may arise that the unauthorized portion is not separable from the authorized portion and in that case the principal will not be bound by anything of that transaction, i.e., such transaction will fail absolutely to bind the principal. Section 228 says—

> Where an agent does more than he is authorized to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.
>
> *Illustration*
>
> A authorizes B to buy 500 sheep for him. B buys 500 sheep and 200 lambs for one sum of 6,000 Taka. A may repudiate the whole transaction.

Thus the section may be dissected as such—

i. The agent exceeds his authority and does something beyond his authority.

ii. The whole transaction is not beyond his authority, rather a part of it is within his authority.

iii. The authorized part of the act done by him is not separable from the part which is unauthorized.

iv. Under such circumstance, the principal may deny the liability for whole transaction. .

Consequences of third party's notice given to agent: How does a notice served to an agent by third person bind the principal?

This question has been answered in section 229 which says—

> Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequences as if it had been given to or obtained by the principal.
>
> *Illustrations*
>
> (a) A is employed by B to buy from C certain goods, of which C is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, A learns that the goods really belonged to D, but B is ignorant of that fact. B is not entitled to set off a debt owing to him from C against the price of the goods.
>
> (b) A is employed by B to buy from C goods of which C is the apparent owner. A was, before he was so employed, a servant of C, and then learnt that the goods really belonged to D, but B is ignorant of that fact. In spite of the knowledge of his agent, B may set off against the price of the goods a debt owing to him from C.

Thus it appears that even if a notice is not served actually to the principal, it may bind him if that is served to his agent with the same status as if it has been actually served to him and the condition to be satisfied is that such notice must be served in the course of the business transacted by him for the principal.

Agent cannot personally enforce, nor be bound by, contracts on behalf of principal: Section 230 says—

> In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him

on behalf of his principal, nor is he personally bound by them.

Such a contract shall be presumed to exist in the following cases:-

(1) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;

(2) Where the agent does not disclose the name of his principal;

(3) where the principal, though disclosed, cannot be sued.

Thus the above section, in it first phase, says that generally an agent cannot personally enforce contracts entered into by him on behalf of his principal and he is even not personally bound by them. But if there exists any contract to the contrary then this rule will not be applied, i.e., in that case an agent can personally enforce contracts entered into by him on behalf of his principal and he also may be personally bound by them.

In the second phase, the section actually mentions the following three circumstances where such a contrary contract will be presumed even though there is no such actual contract to the contrary:

i. Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad.

ii. Where the agent does not disclose the name of his principal.

iii. Where the principal, though disclosed, cannot be sued.

Thus in the above circumstances the agent can personally enforce contracts entered into by him on behalf of his principal and he may be personally bound by them, because of the presumption of law regarding the existence of such a contract between the principal and agent to that effect. However, when an express contract will be found to that effect then the law need not to do such presumption to award the same legal consequence.

Since principal and agent both are parties, decree can be passed only against the principal.[1] In the case of *Argbats Aktiebolaget Bohuslanaka Kusten Vs. Central Hardware Stores*[2]—

> The master of a vessel of a foreign company which carried on business in Chittagong through its agent in Pakistan asked the plaintiff (respondent) to supply some materials needed for the vessel. Before making the supply the plaintiff contracted the agent appellant No.2 to ensure payment of the price of the goods and the agent undertook to pay the price if the Master of the vessel signed the bill in acknowledgment of the delivery of the goods. Goods as required were supplied and the bill for payment was also duly signed by the Master of the vessel. When, however, the bill was presented to the agent the latter declined to make the payment.
>
> In a suit brought by the plaintiff it was contended that since the contract of supply of the materials was made directly between the principal (the appellant No.1) and the plaintiff, the agent, appellant No.2 was not personally liable to pay the amount.
>
> *Held:*
>
> In the present case the agent had made himself personally liable as a guarantor and it was thus a case of personal

---

[1] East and West Steamship Co. Vs. Hossain Brothers, (1967) 19 DLR 75.
[2] (1969) 21 DLR (SC) 245.

> liability by contract. The liability of the agent, being thus direct, both as a guarantor and as an agent, he cannot enjoy the negative protection afforded by section 230 of the Act, nor is it necessary in this case to invoke the presumptive clause of section 230 in favor of that contract to hold the agent liable because his principal (appellant No.1) was a merchant residing abroad.'

It was observed in *Hegge and Co. (Pak.) Ltd, Chittagong V. Arag Limited*[3] that—

> 'The provisions of clause 2 of section 230 of the Contract Act under which an agent becomes liable under a contract on the ground that he has not disclosed the name of his principal are attracted to a case when particular contract is entered into by the agent.
>
> When the contract is by the principal himself and the agent has nothing to do with it and it was entered into in his absence the exceptions mentioned in section 230 whereby an agent is deemed to be a contracting party himself are not attracted.

Rights of parties to a contract made by agent not disclosed: Section 231 says—

> If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal.
>
> If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfill the contract, if he can show that, if he had known who was the principal in the contract, or if he had known

[3] (1967) 19 DLR 24.

> that the agent was not a principal, he would not have entered into the contract.

Thus, the above mention second paragraph gives the other contracting party the right to refuse to fulfill the contract if the principal discloses himself before the contract is complete. So, if the existence of the principal is not disclosed by the principal, rather it is somehow known to him, this provision will not be operative because the law uses the terms 'If the principal discloses himself', so such disclosure is to be made by the principal.[1]

Performance of contract with agent supposed to be principal: Section 232 says—

> Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract.
>
> *Illustration*
>
> A, who owes 500 Taka to B, sells 1,000 Taka, worth of rice to B. A is acting as agent for C in the transaction, but B has no knowledge nor reasonable ground of suspicion that such is the case. C cannot compel B to take the rice without allowing him to set off A's debt.

Right of person dealing with agent personally liable: Section 233 says—

> In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable.

---

[1] Lakshmandas Vs. Lane (1904) 32 Bom. 356; Kapurji Magniram Vs. Panaji Devichand, 53 Bom. 110.

Illustration

A enters into a contract with B to sell him 100 bales of cotton, and afterwards discovers that B was acting as agent for C. A may sue either B or C, or both, for the price of the cotton.

Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable: Section 234 says—

> When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

Liability of pretended agent: Section 235 says—

> A person untruly representing himself to be the authorized agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.

Person falsely Contracting as agent not entitled to performance: Section 236 says—

> A person with whom a contract has been entered into in the character of agent is not entitled to require the performance of it if he was in reality acting, not as agent, but on his own account.

Liability of principal inducing belief that agent's unauthorized acts were authorized: Section 237 says—

> When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or

obligations if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

Illustrations

(a) A consigns goods to B for sale, and gives him instructions not to sell under a fixed price. C, being ignorant of B's instructions, enters into a contract with B to buy the goods at a price lower than the reserved price. A is bound by the contract.

(b) A entrusts B with negotiable instruments endorsed in blank. B sells them to C in violation of private orders from A. The sale is good.

Effect, on agreement of misrepresentation or fraud by agent: Section 238 says—

Misrepresentation made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentationss or frauds had been made or committed by the principals; but misrepresentations made, or frauds committed, by agents, in matter which do not fall within their authority, do not affect their principals.

Illustrations

(a) A, being B's agent for the sale of goods, induces C to buy them by a misrepresentation, which he was not authorized by B to make. The contract is voidable, as between B and C, at the option of C.

(b) A, the captain of B's ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between B and the pretended consignor.

Appendix

The Contract Act, 1872

The Contract Act

[1](Act No. IX of 1872)

[25th April, 1872]

Preamble. WHEREAS it is expedient to define and amend certain parts of the law relating to contracts;

It is hereby enacted as follows:-

PRELIMINARY

Short Title. **1.** This Act may be called the Contract Act, 1872.

Extent and Commencement It extends to the whole of [2][Bangladesh] and it shall come into force on the first day of September, 1872.

Enactment repealed. Nothing herein contained shall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act.

Interpretation clause. **2.** In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context :-

(a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of

---

[1] For the Statement of objects and Reasons for the Bill which was based on a report of Her Majesty's Commissioners appointed to prepare a body of substantive law for India, dated July 6th, 1866, See Gazette of India, 1867, Ext, p. 34; for the Report of the Select Committee, See, ibid, Ext, dated 28th march, 1872; for discussions in Council See ibid, 1867, supplement, P. 1064; ibid, 1871, p. 313; and ibid, 1872 p. 527.

[2] The word 'Bangladesh' was substituted for the word 'Pakistan' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

that other to such act or abstinence, he is said to make a proposal:

(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise:

(c) The person making the proposal is called the "promisor" and the person accepting the proposal is called the "promisee":

(d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains, from doing or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise:

(e) Every promise and every set of promises, forming the consideration for each other, is an agreement:

(f) Promises which form the consideration or part of the consideration for each other are called reciprocal promises:

(g) An agreement not enforceable by law is said to be void:

(h) An agreement enforceable by law is a contract:

(i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract:

(j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

CHAPTER I
OF THE COMMUNICATION, ACCEPTANCE AND REVOCATION OF PROPOSALS.

Communication, acceptance and revocation of proposals.

3. The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking by which he intends to communicate such proposal, acceptance or revocation or which has the effect of communicating it.

Communication when complete.

4. The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The Communication of an acceptance is complete:-

as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;

as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete:-

as against the person who makes it when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;

as against the person to whom it is made, when it comes to his knowledge.

Illustrations

(a) A proposes, by letter, to sell a house to B, at a certain price. The communication of the proposal is complete when B receives the letter.

(b) B accepts A's proposal by a letter sent by post.

The communication of the acceptance is complete;

as against A, when the letter is posted;

as against B, when the letter is received by A.

(c) A revokes his proposal by telegram.

The revocation is complete as against A, when the telegram is despatched. It is complete as against B, when B receives it.

B revokes his acceptance by telegram. B's revocation is complete as against B when the telegram is dispatched, and as against A when it reaches him.

5. A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards. Revocation of proposals and acceptances.

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

Illustrations

A proposes, by a letter sent by post, to sell his house to B.

B accepts the proposal by a letter sent by post.

A may revoke his proposal at any time before or at the moment when B posts his letter of acceptance, but not afterwards.

B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches A, but not afterwards.

Revocation how made.

6. A proposal is revoked—

(1) by the communication of notice of revocation by the proposer to the other party;

(2) by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance;

(3) by the failure of the acceptor to fulfil a condition precedent to acceptance; or

(4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

Acceptance must be absolute.

7. In order to convert a proposal into a promise, the acceptance must—

(1) be absolute and unqualified;

(2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal

shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance.

Acceptance by performing conditions or receiving consideration.

8. Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

Promises, express and implied.

9. In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

CHAPTER II
OF CONTRACTS, VOIDABLE CONTRACTS AND VOID AGREEMENTS

What agreements are contracts.

10. All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in [3][Bangladesh], and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

Who are competent to contract.

11. Every person is competent to contract who is of the age of majority according to the law to which he

[3] The word "Bangladesh" was substituted for the word "Pakistan" by the Bangladesh Laws (Revision and declaration) Act, 1973 (Act VIII of 1973), 2nd Sch. (with effect from 26-3-71).

is subject[4], and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

What is a sound mind for the purposes of contracting.

12. A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Illustrations

(a) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

(b) A sane man, who is delirious from fever, or who is so drunk that he cannot understand the terms of a contract, or from a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.

"Consent" defined.

13. Two or more persons are said to consent when they agree upon the same thing in the same sense.

"Free consent" defined.

14. Consent is said to be free when it is not caused by:-

(1) coercion, as defined in section 15, or

[4] *See* the majority Act, 1875 (Act IX of 1875)

(2) undue influence, as defined in section 16, or

(3) fraud, as defined in section 17, or

(4) misrepresentation, as defined in section 18, or

(5) mistake, subject to the provisions of sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

"Coercion" defined.

15. "Coercion" is the committing, or threatening to commit, any act forbidden by the [5][Penal Code], or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Explanation.- It is immaterial whether the [6][Penal Code] is or is not in force in the place where the coercion is employed.

Illustrations

A, on board an English ship on the high seas, causes B to enter into an agreement by an act

---

[5] The words 'Penal Code ' were substituted for the words 'Pakistan Penal Code' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[6] The words 'Penal Code ' were substituted for the words 'Pakistan Penal Code' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

amounting to criminal intimidation under the [7][Penal Code]. A afterwards sues B for breach of contract at [Chittagong]. A has employed coercion, although his act is not an offence by the law of England, and although section 506 of the [8][Penal Code] was not in force at the time when or place where the act was done.

"Undue Influence" defined.

[9] **[16.** (1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other-

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another:

(a) where he holds a real or apparent authority over the other or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

---

[7] The words 'Penal Code' were substituted for the words 'Pakistan Penal Code' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[8] The words 'Penal Code' were substituted for the words 'Pakistan Penal Code' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[9] Subs. by the Indian Contract Act Amendment Act, 1899 (VI of 1899) s.2, for the original s.16.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of section 111 of the Evidence Act, 1872.]

Illustrations

(a) A having advanced money to his son, B, during his minority, upon B's coming of age obtains, by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advance. A employs undue influence.

(b) A, a man enfeebled by disease or age, is induced, by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional service. B employs undue influence.

(c) A, being in debt to B, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.

(d) A applies to a banker for a loan at a time when there is stringency, in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the

ordinary course of business, and the contract is not induced by undue influence.

"Fraud" defined.

17. "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent[10], with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :-

(1) the suggestion, as to a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

Explanation.- Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, [11]or unless his silence is, in itself, equivalent to speech.

Illustrations

(a) A sells, by auction, to B, a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud in A.

(b) B is A's daughter and has just come of age. Here, the relation between the parties would

---

[10] Compare s. 238, *infra*.
[11] see s. 143, *infra*.

make it A's duty to tell B if the horse is unsound.

(c) B says to A— "If you do not deny it, I shall assume that the horse is sound." A says nothing. Here A's silence is equivalent to speech.

(d) A and B, being traders, enter upon a contract. A has private information of a change in prices which would effect B's willingness to proceed with the contract. A is not bound to inform B.

18. "Misrepresentation" means and includes- "Misrepresentation" defined.

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(2) any breach of duty which, without an intent to deceive, gains and advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him;

(3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

19. When consent to an agreement is caused by coercion, [12]* * fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. Voidability of agreements without free consent.

[12] The words 'undue influence" were repealed by the Indian contract Act Amendment Act, 1899 (VI of 1899), s.3.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception.- If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.- A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

Illustrations

(a) A, intending to deceive B, falsely represents that 500 maunds of indigo are made annually at A's factory, and thereby induces B to buy the factory. The contract is voidable at the option of B.

(b) A, by a misrepresentation, leads B erroneously to believe that 500 maunds of indigo are made annually at A's factory. B examines the accounts of the factory, which shows that only 400 maunds of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation.

(c) A fraudulently informs B that A's estate is free from encumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid the contract, or may insist on

its being carried out, and the mortgage debt redeemed.

(d) B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal, the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an under-value. The contract is voidable at the option of A.

(e) A is entitled to succeed to an estate at the death of B; B dies; C, having received intelligence of B's death, prevents the intelligence reaching A, and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A.

Power to set aside contract induced by undue influence.

[13][19A. When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.

Illustrations

(a) A's son has forged B's name to a promissory note. B, under threat of prosecuting A's son, obtains a bond from A for the amount of the forged note. If B sues on this bond, the Court may set the bond aside.

---

[13] Section 19A was inserted by the Indian Contract Act Amendment Act1899 (VI of 1899), section 3.

(b) A, a money-lender, advances [14][Taka] 100 to B, an agriculturist, and, by undue influence, induces B to execute a bond for [15][Taka] 200 with, interest at 6 per cent per month. The Court may set the bond aside, ordering B to repay the [16][Taka] 100 with such interest as may seem just.]

Agreement void where both parties are under a mistake as to matter of fact.

20. Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Explanation.- An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.

Illustrations

(a) A agrees to sell to B a specific cargo of goods supposed to be on its way from England to [17][Chittagong]. It turns out that, before the day of the bargain, the ship conveying the cargo

---

[14] The word 'Taka ' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[15] The word 'Taka ' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[16] The word 'Taka ' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[17] The word 'Chittagong ' was substituted for the word 'Karachi' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), Second Schedule, (with effect from 26-3-71).

had been cast away, and the goods lost. Neither party was aware of these facts. The agreement is void.

(b) A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.

(c) A, being entitled to an estate for the life of B, agrees to sell it to C. B was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

Effect of mistakes as to law.

21. A contract is not voidable because it was caused by a mistake as to any law in force in [18][Bangladesh]; but a mistake as to a law not in force in [19][Bangladesh] has the same effect as a mistake of fact.

[20]* * * * * *

Illustration

A and B make a contract grounded on the erroneous belief that a particular debt is barred by the [21][Bangladesh] Law of Limitation: the contract is not voidable.

---

[18] The word 'Bangladesh ' is substituted for the word 'Pakistan' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[19] The word 'Bangladesh ' was substituted for the word 'Pakistan' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[20] Second paragraph of section 21 was omitted, *ibid.*

[21] The word 'Bangladesh ' was substituted for the word 'Pakistan' by the Bangladesh Laws (Revision and Declaration)

Contract caused by mistake of one party as to matter of fact.

[22]* * * * * *

22. A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

What considerations and objects are lawful and what not.

23. The consideration or object of an agreement is lawful, unless - it is forbidden by law[23]; or

is of such a nature that, if permitted, it would defeat the provisions of any law; or

is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Illustrations

(a) A agrees to sell his house to B for 10,000 Taka. Here B's promise to pay the sum of 10,000 Taka is the consideration for A's promise to sell the house, and A's promise to sell the house is the consideration for B's promise to pay the 10,000 Taka. These are lawful considerations.

(b) A promises to pay B 1,000 Taka at the end of six months, if C, who owes that sum to B, fails to pay it. B promises to grant time to C accordingly. Here the promise of each party is

---

Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[22] Second illustration to section 21 was repealed by the Repealing and Amending Act, 1917 (XXIV of 1917), s.3 and Sch. II.

[23] *See* sections 26, 27, 28, 30, *infra*.

the consideration for the promise of the other party, and they are lawful considerations.

(c) A promises, for a certain sum paid to him by B, to make good to B the value of his ship if it is wrecked on a certain voyage. Here A's promise is the consideration for B's payment, and B's payment is the consideration for A's promise and these are lawful considerations.

(d) A promises to maintain B's child, and B promises to pay A 1,000 Taka yearly for the purpose. Here the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

(e) A, B and C enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(f) A, promises to obtain for B an employment in the public service, and B promises to pay 1,000 Taka to A. The agreement is void, as the consideration for it is unlawful.

(g) A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment by A, on his principal.

(h) A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

(i) A's estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. B, upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

(j) A, who is B's mukhtar, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1,000 Taka to A. The agreement is void, because it is immoral.

(k) A agrees to let her daughter on hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the [24][Penal Code].

Agreements void, if considerations and objects unlawful in part.

24. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object is unlawful, the agreement is void.

Illustration

A promises to superintend, on behalf of B, a legal manufacture of indigo, and an illegal traffic in other articles. B promises to pay to A a salary of 10,000 Taka a year. The agreement is void, the object of A's promise and the consideration for B's promise being in part unlawful.

---

[24] The words 'Penal Code ' were substituted for the words 'Pakistan Penal Code' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

25. An agreement made without consideration is void, unless-

Agreement without consideration void, unless it is in writing and registered, or is a promise to compensate for something done; or is a promise to pay a debt barred by limitation law.

(1) It is expressed in writing and registered under the law for the time being in force for the registration of [25][documents], and is made on account of natural love and affection between parties standing in a near relation to each other; or unless

(2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do, or unless

(3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract.

Explanation 1.- Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation 2.- An agreement to which the consent of the promisor is freely even is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

---

[25] The word within square brackets was substituted for the word "assurances" by the Amending Act, 1891 (XII of 1891).

Illustrations

(a) A promises, for no consideration, to give to B [26][Taka] 1,000. This is a void agreement.

(b) A, for natural love and affection, promises to give his son, B, [27][Taka] 1,000. A puts his promise to B into writing and registers it. This is a contract.

(c) A finds B's purse and gives it to him. B promises to give A [28][Taka] 50. This is a contract.

(d) A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract.

(e) A owes B [29][Taka] 1,000 but the debt is barred by the Limitation Act. A signs a written promise to pay B [30][Taka] 500 on account of the debt. This is a contract.

---

[26] The word 'Taka ' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[27] The word 'Taka ' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[28] The word 'Taka ' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[29] The word 'Taka ' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[30] The word 'Taka ' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

(f) A agrees to sell a horse worth [31][Taka] 1,000 for [32][Taka] 10. A's consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.

(g) A agrees to sell a horse worth [33][Taka] 1,000 for [34][Taka] 10. A denies that his consent to the agreement was freely given.

The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not A's consent was freely given.

Agreement in restraint of marriage void.

26. Every agreement in restraint of the marriage of any person, other than a minor, is void.

Agreement in restraint of trade void.

27. Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Exception 1. - Saving of agreement not to carry on business of which goodwill is sold. One who sells

---

[31] The word 'Taka ' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[32] The word 'Taka ' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[33] The word 'Taka ' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[34] The word 'Taka ' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein: Provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

35* * * * * *

Agreements in restraint of legal proceedings void.

28. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Saving of contract to refer to arbitration dispute that may arise.

Exception 1.- This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of that dispute so referred.

Suits barred by such Contracts.

When such a contract has been made, a suit may be brought for its specific performance, and if a suit other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.

---

[35] Exceptions 2 and 3 relating to agreements between partners upon, or in anticipation of, dissolution of partnership and during continuance of partnership, respectively, rep. by the Partnership Act, 1932 (IX of 1932), s. 73 and Sch. II see now ss. 11(2) and 36 (2) of that Act.

Exception 2. -Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

Saving of contract to refer questions that have already arisen.

29. Agreements, the meaning of which is not certain, or capable of being made certain, are void.

Agreements void for uncertainty

Illustration

(a) A agrees to sell to B "a hundred tons of oil." There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

(b) A agrees to sell to B one hundred tons of oil of a specified description, known as an article of commerce. There is no uncertainty here to make the agreement void.

(c) A, who is a dealer in coconut-oil only, agrees to sell to B "one hundred tons of oil." The nature of A's trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of coconut-oil.

(d) A agrees to sell to B "all the grain in my granary at [36][Rangpur]". There is no uncertainty here to make the agreement void.

(e) A agrees to sell to B "one thousand maunds of rice at a price to be fixed by C." As the price is capable of being made certain, there is no uncertainty here to make the agreement void.

---

[36] The word "Rangpur" was substituted for the word "Rahimyarkhan" by Act VIII of 1973, 2nd Sch. (with effect from 26-3-71).

(f) A agrees to sell to B "my white horse for Taka five hundred or Taka one thousand." There is nothing to show which of the two prices was to be given. The agreement is void.

Agreements by way of wager void.

30. Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any Wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

Exception in favour of certain prizes for horse-racing.

The section shall not be deemed to render unlawful a subscription, or contribution, or agreement to subscribe or contribute, made or entered into for or towards any plate, prize or sum of money, of the value or amount of five hundred Taka or upwards, to be awarded to the winner or winners of any horse-race.

Section 294A of the Penal Code not affected.

Nothing in this section shall be deemed to legalise any transaction connected with horse-racing, to which the provisions of section 294A of the [37][Penal Code] apply.

Agreements collateral to wagering agreements void

30A. All agreements knowingly made to further or assist the entering into effecting or carrying out, or to secure or guarantee the performance, of any agreement void under section 30, are void.

No suit for recovery of money, commission etc., in respect of void agreements.

30B. No suit or other proceeding shall lie for the recovery of

(a) any sum of money paid or payable in respect of any agreement void under section 30A, or

---

[37] The words 'Penal Code' were substituted for the words 'Pakistan Penal Code' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

(b) any commission, brokerage, fee, or reward in respect of knowingly effecting or carrying out, or aiding in effecting or carrying out, of any such agreement or of any sum of money otherwise claimed or claimable in respect thereof, or

(c) any sum of money knowingly paid or payable on account of any person by way of commission, brokerage, fee, reward or other claim in respect of any such agreement.

Payment by guardian, executor etc., in respect of void agreements not to be allowed credit.

30C. No guardian, executor, administrator, heir or personal representative of any minor or deceased person, as the case may be, shall be entitled to or allowed any credit in his account for or in respect of any payment made by him on behalf of such minor or deceased person in respect of any such agreement, or any such commission, brokerage, fee, reward or claim as is referred to in sections 30A and 30B.

CHAPTER III
OF CONTINGENT CONTRACTS

"Contingent contract" defined.

31. A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.

Illustration

A contracts to pay B [38][Taka] 10,000 if B's house is burnt. This is a contingent contract.

Enforcement of contracts contingent on an event happening.

32. Contingent contracts to do or not to do anything if an uncertain future event happens

[38] The word 'Taka ' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

cannot be enforced by law unless and until that event has happened.

If the event becomes impossible, such contracts become void.

Illustrations

(a) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.

(b) A makes a contract with B to sell a horse to B, at a specified price, if C, to whom the horse had been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to by the horse.

(c) A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.

Enforcement of contracts contingent on an event not happening.

33. Contingent contracts to do or not to do anything if an uncertain future event does not happen can be enforced when the happening of that event becomes impossible, and not before.

Illustration

A agrees to pay B a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

When event on which contract is contingent to be deemed impossible if it is the future conduct of a living person.

34. If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible, that he should so act within any definite time, or otherwise than under further contingencies.

Illustration

A agrees to pay B a sum of money if B marries C. C marries D. The marriage of B to C must now be considered impossible, although it is possible that D may die and that C may afterwards marry B.

35. Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

When contracts become void which are contingent on happening of specified event within fixed time.

Contingent contracts to do or not to do anything if a specified uncertain event does not happen within a fixed time may be enforced by law when the time fixed has expired and such event has not happened or, before the time fixed has expired, if it becomes certain that such event will not happen.

When contracts may be enforced which are contingent on specified event not happening within fixed time.

Illustrations

(a) A promises to pay B, a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.

(b) A promises to pay B a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

36. Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or

Agreements contingent on impossible events void.

not to the parties to the agreement at the time when it is made.

Illustrations

(a) A agrees to pay B 1,000 Taka if two straight lines should enclose a space. The agreement is void.

(b) A agrees to pay B 1,000 Taka if B will marry A's daughter C. C was dead at the time of the agreement. The agreement is void.

CHAPTER IV
OF THE PERFORMANCE OF CONTRACTS

Contracts which must be performed

Obligation of parties to contracts.

37. The parties to a contract must either perform or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of the death of such promises before performance, unless a contrary intention appears from the contract.

Illustrations

(a) A promises to deliver goods to B on a certain day on payment of [39][Taka] 1,000. A dies before that day. A's representatives are bound to

[39] The word 'Taka ' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

deliver the goods to B, and B is bound to pay the [40][Taka] 1,000 to A's representatives.

(b) A promises to paint a picture for B by a certain day, at a certain price. A dies before the day. The contract cannot be enforced either by A's representatives or by B.

Effect of refusal to accept offer of performance.

38. Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Every such offer must fulfill the following conditions:-

it must be unconditional;

it must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do;

if the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

Illustration

---

[40] The word 'Taka ' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

A contracts to deliver to B at his w
1st March, 1873, 100 bales of cotton
quality. In order to make an offer of p
with the effect stated in this section, A mu
the cotton to B's warehouse, on the appointed day,
under such circumstances that B may have a
reasonable opportunity of satisfying himself that
the thing offered is cotton of the quality contracted
for, and that there are 100 bales.

Effect of refusal of party to perform promise wholly.

39. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words on conduct, his acquiescence in its continuance.

Illustrations

(a) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her 100 Taka for each night's performance. On the sixth night A willfully absents herself from the theatre. B is at liberty to put an end to the contract.

(b) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her at the rate of 100 Taka for each night. On the sixth night A willfully absents herself. With the assent of B, A sings on the seventh night. B has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damage sustained by him through A's failure to sing on the sixth night.

By whom Contracts must be Performed.

40. If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it. Person by whom promise is to be performed.

Illustrations

(a) A promises to pay B a sum of money. A may perform this promise, either by personally paying the money to B or by causing it to be paid to B by another; and, if A dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.

(b) A promises to paint a picture for B. A must perform this promise personally.

41. When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor. Effect of accepting performance from third person.

42. When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons during their joint lives, and after the death of any of them his representative jointly with the survivor or survivors, and after the death of the last survivor, the representatives of all jointly, must fulfill the promise. Devolution of joint liabilities

43. When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any [one or more] of such joint promisors to perform the whole of the promise. Any one of joint promisors may be compelled to perform.

Each promisor may compel contribution.

Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

Sharing of loss by default in contribution.

If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Explanation.- Nothing in this section shall prevent a surety from recovering from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

Illustrations

(a) A, B and C jointly promise to pay D 3,000 Taka. D may compel either A or B or C to pay him 3,000 Taka.

(b) A, B and C jointly promise to pay D the sum of 3,000 Taka. C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one-half of his debts. C is entitled to receive 500 Taka from A's estate, and 1,250 Taka from B.

(c) A, B and C are under a joint promise to pay D 3,000 Taka. C is unable to pay anything, and A is compelled to pay the whole. A is entitled to receive 1,500 Taka from B.

(d) A, B and C are under a joint promise to pay D 3,000 Taka, A and B being only sureties for C. C fails to pay. A and B are compelled to pay the whole sum. They are entitled to recover it from C.

44. Where two or more persons have made a joint promise, a release of one of such joint promisors, by the promisee does not discharge the other joint promisor or joint promisors ; neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors.

Effect of release of one joint promisor.

45. When a person has made a promise to two or more persons jointly, then unless a contrary intentions appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor with the representatives of all jointly.

Devolution of joint rights.

Illustration

A, in consideration of 5,000 Taka lent to him by B and C, promises B and C, jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's representatives jointly with C during C's life, and after the death of C with the representatives of B and C jointly.

Time and Place for Performance

46. Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Time for performance of promise where no application is to be made and no time is specified.

Explanation.-The question "what is a reasonable time" is, in each particular case, a question of fact.

Time and place for performance of promise where time is specified and no application to be made.

47. When promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.

Illustration

A promises to deliver goods at B's warehouse on the first January. On that day A brings the goods to B's warehouse, but after the usual hour for closing it, and they are not received. A has not performed his promise.

Application for performance on certain day to be at proper time and place.

48. When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.

Explanation.- The question "what is a proper time and place" is, in each particular case, a question of fact.

Place for performance of promise where no application to be made and no place fixed for performance.

49. When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.

Illustration

A undertakes to deliver a thousand maunds of jute to B on a fixed day. A must apply to B to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

50. The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions.

Performance in manner or at time prescribed or sanctioned by promisee.

Illustrations

(a) B owes A, 2,000 Taka. A desires B to pay the amount to A's account with C, a banker. B, who also banks with C, orders the amount to be transferred from his account to A's credit, and this is done by C. Afterwards, and before A knows of the transfer, C fails. There has been a good payment by B.

(b) A and B are mutually indebted. A and B settle an account by setting off one item against another, and B pays A the balance found to be due from him upon such settlement. This amounts to a payment by A and B, respectively, of the sums which they owed to each other.

(c) A owes B 2,000 Taka. B accepts some of A's goods in deduction of the debt. The delivery of the goods operates as a part payment.

(d) A desires B, who owes him [41][Taka] 100, to send him a note for [42][Taka] 100 by post. The debt is discharged as soon as B puts into the post a letter containing the note duly addressed to A.

---

[41] The word 'Taka ' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[42] The word 'Taka ' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

Performance of Reciprocal Promise.

Promisor not bound to perform, unless reciprocal promisee ready and willing to perform.

51. When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Illustrations

(a) A and B contract that A shall deliver goods to B to be paid for by B on delivery.

A need not deliver the goods, unless B is ready and willing to pay for the goods on delivery.

B need not pay for the goods, unless A is ready and willing to deliver them on payment.

(b) A and B contract that A shall deliver goods to B at a price to be paid by installments, the first installment to be paid on delivery.

A need not deliver, unless B is ready and willing to pay the first installment on delivery.

B need not pay the first installment, unless A is ready and willing to deliver the goods on payment of the first installment.

Order of performance of reciprocal promises.

52. Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

Illustrations

(a) A and B contract that A shall build a house for B at a fixed price. A's promise to build the

house must be performed before B's promise to pay for it.

(b) A and B contract that A shall make over his stock-in-trade to B at a fixed price, and B promises to give security for the payment of money. A's promise need not be performed until the security is given for the nature of the transaction requires that A should have security before he delivers up his stock.

Liability of party preventing event on which the contract is to take effect.

53. When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

Illustration

A and B contract that B shall execute certain work for A for a thousand Taka. B is ready and willing to execute the work accordingly, but A prevents him from doing so. The contract is voidable at the option of B; and, if he elects to rescind it, he is entitled to recover from A compensation for any loss which he has incurred by its non-performance.

Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises.

54. When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other

party may sustain by the non-performance of the contract.

Illustrations

(a) A hires B's ship to take in and convey, from [43][Chittagong] to the Mauritius, a cargo to be provided by A, B receiving a certain freight for its conveyance. A does not provide any cargo for the ship. A cannot claim the performance of B's promise, and must make compensation to B for the loss which B sustains by the non-performance of the contract.

(b) A contracts with B to execute certain builders' work for a fixed price, B supplying the scaffolding and timber necessary for the work. B refuses to furnish any scaffolding or timber, and the work cannot be executed. A need not execute the work, and B is bound to make compensation to A for any loss caused to him by the non-performance of the contract.

(c) A contracts with B to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and B engages to pay for the merchandise within a week from the date of the contract. B does not pay within the week. A's promise to deliver need not be performed, and B must make compensation.

(d) A promises B to sell him one hundred bales of merchandise, to be delivered next day, and B promises A to pay for them within a month. A

---

[43] The word 'Chittagong' was substituted for the word 'Karachi' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

does not deliver according to his promise. B's promise to pay need not be performed and A must make compensation.

55. When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract. Effect of failure to perform at fixed time, in contract in which time is essential.

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure. Effect of such failure when time is not essential.

If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance he gives notice to the promisor of his intention to do so. Effect of acceptance of performance at time other than that agreed upon.

56. An agreement to do an act impossible in itself is void. Agreement to do impossible

A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. Contract to do act afterwards becoming impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful

Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

Illustrations

(a) A agrees with B to discover treasure by magic. The agreement is void.

(b) A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.

(c) A contracts to marry B, being already married to C, and being forbidden by the law to which he is subject to practise polygamy. A must make compensation to B for the loss caused to her by the non-performance of his promise.

(d) A contracts to take in cargo for B at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.

(e) A contracts to act at a theatre for six months in consideration of a sum, paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void.

Reciprocal promise to do things legal, and also other things illegal.

57. Where persons reciprocally promise, firstly, to do certain things which are legal, and, secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement.

Illustration

A and B agree that A shall sell B a house for 10,000 Taka but that, if B uses it as a gambling house, he shall pay A 50,000 Taka for it.

The first set of reciprocal promises, namely, to sell the house and to pay 10,000 Taka for it, is a contract.

The second set is for an unlawful object, namely, that B may use the house as a gambling house, and is a void agreement.

58. In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced. Alternative promise one branch being illegal.

Illustration

A and B agree that A shall pay B 1,000 Taka for which B shall afterwards deliver to A either rice or smuggled opium.

This is a valid contract to deliver rice, and a void agreement as to the opium.

Appropriation of Payments

59. Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment if accepted, must be applied accordingly. Application of payment which debt to be discharged is indicated.

Illustrations

(a) A owes B, among other debts, 1,000 Taka upon a promissory note which falls due on the first June. He owes B no other debt of that amount.

On the first June A pays to B 1,000 Taka. The payment is to be applied to the discharge of the promissory note.

(b) A owes to B, among other debts the sum of 567 Taka. B writes to A and demands payment of this sum. A sends to B 567 Taka. This payment is to be applied to the discharge of the debt of which B had demanded payment.

Application of payment, where debt to be discharged is not indicated.

60. Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

Application of payment where neither party appropriates.

61. Where neither party makes any appropriation the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionably.

Contracts which need not be performed

Effect of novation; rescission and alteration of contract.

62. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

Illustrations

(a) A owes money to B under a contract. It is agreed between A, B and C that B shall thenceforth accept C as his debtor, instead of A. The old debt of A to B is at an end, and a new debt from C to B has been contracted.

(b) A owes B 10,000 Taka. A enters into an arrangement with B, and gives B a mortgage of his (A's) estate for 5,000 Taka, in place of the debt of 10,000 Taka. This is a new contract and extinguishes the old.

(c) A owes B 1,000 Taka under a contract. B owes C 1,000 Taka. B orders A to credit C with 1,000 Taka in his books, but C does not assent to the arrangement. B still owes C 1,000 Taka, and no new contract has been entered into.

Promisee may dispense with or remit performance of promise.

63. Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

Illustrations

(a) A promises to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise.

(b) A owes B, 5,000 Taka. A pays to B, and B accepts, in satisfaction of the whole debt, 2,000 Taka paid at the time and place at which the 5,000 Taka were payable. The whole debt is discharged.

(c) A owes B 5,000 Taka. C pays to B 1,000 Taka, and B accepts them, in satisfaction of his claim on A. This payment is a discharge of the whole claim.

(d) A owes B, under a contract, a sum of money, the amount of which has not been ascertained. A, without ascertaining the amount, gives to B, and B, in satisfaction thereof, accepts, the sum

of 2,000 Taka. This is a discharge of the whole debt, whatever may be its amount.

(e) A owes B 2,000 Taka and is also indebted to other creditors, A makes an arrangement with his creditor's including B, to pay them a composition of eight annas in the Taka upon their respective demands. Payment to B of 1,000 Taka is a discharge of B's demand.

Consequences of rescission of voidable contract.

64. When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit so far as may be, to the person from whom it was received.

Obligation of person who has received advantage under void agreement or contract that becomes void.

65. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it.

Illustrations

(a) A pays B 1,000 Taka in consideration of B's promising to marry C, A's daughter. C is dead at the time of the promise. The agreement is void, but B must repay A the 1,000 Taka.

(b) A contracts with B to deliver to him 250 maunds of rice before the first of May. A delivers 130 maunds only before that day, and none after. B retains the 130 maunds after the first of May. He is bound to pay A for them.

(c) A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her a hundred Taka for each night's performance. On the sixth night, A willfully absents herself from the theatre, and B, in consequence, rescinds the contract. B must pay A for the five nights on which she had sung.

(d) A contracts to sing for B at a concert for 1,000 Taka which are paid in advance. A is too ill to sing. A is not bound to make compensation to B for the loss of the profits which B would have made if A had been able to sing, but must refund to B the 1,000 Taka paid in advance.

Mode of communicating or revoking rescission of voidable

66. The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.

Effect of neglect of promisee to afford promisor reasonable facilities for performance.

67. If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

Illustration

A contracts with B to repair B's house.

B neglects or refuses to point out to A the places in which his house requires repair.

A is excused for the non-performance of the contract if it is caused by such neglect or refusal.

CHAPTER V
OF CERTAIN RELATIONS RESEMBLING THOSE CREATED BY CONTRACT

Claim for necessaries supplied to person incapable of contracting, or on his account.

68. If a person, incapable of entering into a contract, or anyone whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

Illustrations

(a) A supplies B, a lunatic, with necessaries suitable to his condition in life. A is entitled to be reimbursed from B's property.

(b) A supplies the wife and children of B, a lunatic, with necessaries suitable to their condition in life. A is entitled to be reimbursed from B's property.

Reimbursement of person paying money due by another in payment of which he is interested.

69. A person who is interested in the payment of money which another is bound by law to pay and who therefore pays it, is entitled to be reimbursed by the other.

Illustration

B holds land in Bangladesh, on a lease granted by A, the zamindar. The revenue payable by A to the Government being in arrear his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of B's lease. B, to prevent the sale and the consequent annulment of his own lease, pays to the Government the sum due from A. A is bound to make good to B the amount so paid.

70. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered. Obligation of person enjoying benefit of non-gratuitous act.

Illustrations

(a) A, a tradesman, leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay A for them.

(b) A saves B's property from fire. A is not entitled to compensation from B, if the circumstances show that he intended to act gratuitously.

71. A person who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a bailee. Responsibility of finder of goods.

72. A person to whom money has been paid or anything delivered by mistake or under coercion, must repay, or return it. Liability of person to whom money is paid or thing delivered by mistake or under coercion.

Illustrations

(a) A and B jointly owe 100 Taka to C. A alone pays the amount to C, and B, not knowing this fact, pays 100 Taka over again to C. C is bound to repay the amount to B.

(b) A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

CHAPTER VI
OF THE CONSEQUENCES OF BREACH OF CONTRACT

Compensation for loss or damage caused by breach of contract.

73. When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.

When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation.- In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

Illustrations

(a) A contracts to sell and deliver 50 maunds of saltpetre to B, at a certain price to be paid on delivery. A breaks his promise. B is entitled to receive from A, by way of compensation, the sum, if any, by which the contract price falls short of the price for which B might have obtained 50 maunds of saltpetre of like quality

at the time when the saltpetre ought to have been delivered.

(b) A hires B's ship to go to Chalna, and there take on board on the first of January, a cargo which A is to provide and to bring it to Chittagong, the freight to be paid when earned. B's ship does not go to Chalna, but A has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. A avails himself of those opportunities, but is put to trouble and expense in doing so. A is entitled to receive compensation from B in respect of such trouble and expense.

(c) A contracts to buy of B, at a stated price, 50 maunds of rice, no time being fixed for delivery. A afterwards informs B that he will not accept the rice if tendered to him. B is entitled to receive from A by way of compensation, the amount, if any, by which the contract price exceeds that which B can obtain for the rice at the time when A informs B that he will not accept it.

(d) A contracts to buy B's ship for 60,000 Taka, but breaks his promise. A must pay to B, by way of compensation, the excess, if any, of the contract price over the price which B can obtain for the ship at the time of the breach of promise.

(e) A, the owner of a boat, contracts with B to take a cargo of jute to Mymensingh, for sale at that place, starting on a specified day. The boat owing to some avoidable cause, does not start at the time appointed, whereby the arrival of the cargo at Mymensingh is delayed beyond the time when it would have arrived if the

boat had sailed according to the contract. After that date, and before the arrival of the cargo the price of jute falls. The measure of the compensation payable to B by A is the difference between the price which B could have obtained for the cargo at Mymensingh at the time when it would have arrived if awarded in due course, and its market price at the time when it actually arrived.

(f) A Contracts to repair B's house in a certain manner, and receives payment in advance. A repairs the house, but not according to contract. B is entitled to recover from A the cost of making the repairs conform to the contract.

(g) A contracts to let his ship to B for a year, from the first of January, for a certain price. Freights rise, and on the first of January, the hire obtainable for the ship is higher than the contract price. A breaks his promise. He must pay to B, by way of compensation, a sum equal to the difference between the contract price and the price for which B could hire a similar ship for a year on and from the first of January.

(h) A contracts to supply B with a certain quantity of iron at a fixed price, being a higher price than that for which A could procure and deliver the iron. B wrongfully refuses to receive the iron. B must pay to A, by way of compensation, the difference between the contract price of the iron and the sum for which A could have obtained and delivered it.

(i) A delivers to B, a common carrier, a machine, to be conveyed without delay, to A's mill informing B that this mill is stopped for want

of the machine. B unreasonably delays the delivery of the machine, and A, in consequence, losses a profitable contract with the Government. A is entitled to receive from B, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.

(j) A, having contracted with B to supply B with 1,000 tons of iron at 100 Taka a ton, to be delivered at a stated time, contracts with C for the purchase of 1,000 tons of iron at 80 Taka a ton, telling C that he does so for the purpose of performing his contract with B fails to perform his contract with A, who cannot procure other iron and B in consequence, rescinds the contract. C must pay to A 20,000 Taka, being the profit which A would have made by the performance of his contract with B.

(k) A contracts with B to make and deliver to B, by a fixed day for a specified price a certain piece of machinery. A does not deliver the piece of machinery at the time specified, and, in consequence of this, B is obliged to procure another at a higher price than that which he was to have paid to A and is prevented from performing a contract which B had made with a third person at the time of his contract with A (but which had not been then communicated to A), and is compelled to make compensation for breach of that contract. A must pay to B, by way of compensation, the difference between the contract price of the piece of machinery and the sum paid by B for

another, but not the sum paid by B to the third person by way of compensation.

(l) A, a builder, contracts to erect and finish a house by the first of January, in order that B may give possession of it at that time to C, to whom B has contracted to let it. A is informed of the contract between B and C. A builds the house so badly that, before the first of January it falls down and has to be rebuilt by B, who, in consequence, losses the rent which he was to have received from C, and is obliged to make compensation to C for the breach of his contract. A must make compensation to B for the cost of rebuilding the house, for the rent lost, and for the compensation made to C.

(m) A sells certain merchandise to B, warranting it to be of a particular quality, and B, in reliance upon this warranty, sells it to C with a similar warranty. The goods prove to be not according to the warranty, and B becomes liable to pay C a sum of money by way of compensation. B is entitled to be reimbursed this sum by A.

(n) A contracts to pay a sum of money to B on a day specified. A does not pay the money on that day; B, in consequence of not receiving the money on that day, is unable to pay his debts, and is totally ruined. A is not liable to make good to B anything except the principal sum he contracted to pay, together with interest up to the day of payment.

(o) A contracts to deliver 50 maunds of saltpetre to B on the first of January, at a certain price. B afterwards, before the first of January, contracts to sell the saltpetre to C at a price higher than the market price of the first of

January. A breaks his promise. In estimating the compensation payable by A to B, the market price of the first of January, and not the profit which would have arisen to B from the sale to C, is to be taken into account.

(p) A contracts to sell and deliver 500 bales of cotton to B on a fixed day. A knows nothing of B's mode of conducting his business. A breaks his promise, and B, having no cotton, is obliged to close his mill A is not responsible to B for the loss caused to B by the closing of the mill.

(q) A contracts to sell and deliver to B, on the first of January, certain cloth which B intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time, and too late to be used that year in making caps. B is entitled to receive from A, by way of compensation, the difference between the contract price of the cloth and its market price at the time of delivery but not the profits which he expected to obtain by making caps nor the expenses which he has been put to in making preparation for the manufacture.

(r) A, a shipowner, contracts with B to convey him from Chittagong to Sydney in A's ship, sailing on the first of January, and B pays to A, by way of deposit one-half of his passage-money. The ship does not sail on the first of January, and B, after being, in consequence, detained in Chittagong for some time, and thereby put to some expense, proceeds to Sydney in another vessel, and, in consequence, arriving too late in Sydney, loses a sum of money. A is liable to

repay to B his deposit, with interest, and the expense to which he is put by his detention in Chittagong, and the excess if any, of the passage-money paid for the second ship over that agreed upon for the first, but not the sum of money which B lost by arriving in Sydney too late.

Compensation for breach of contract where penalty stipulated for.

74. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.- A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception.- When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the [44][Government], gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

---

[44] The word 'Government ' was substituted for the words 'Central Government or any Provincial Government' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

Explanation.- A person who enters into a contract with [45][Government] does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

Illustrations

(a) A contracts with B to pay B [46][Taka] 1,000, if he fails to pay B [47][Taka] 500 on a given day. A fails to pay B [48][Taka] 500 on that day. B is entitled to recover from A such compensation, not exceedings [49][Taka] 1,000, as the Court considers reasonable.

(b) A contracts with B that, if A practises as a surgeon within [50][Chittagong], he will pay B

---

[45] The word 'Government ' was substituted for the words 'Central Government' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[46] The word 'Taka ' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[47] The word 'Taka ' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[48] The word 'Taka ' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[49] The word 'Taka ' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[50] The word 'Chittagong ' was substituted for the word 'Calcutta' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[51][Taka] 5,000. A practices as a surgeon in [52][Chittagong]. B is entitled to such compensation, not exceeding [53][Taka] 5,000, as the Court considers reasonable.

(c) A gives a recognizance binding him in a penalty of [54][Taka] 500 to appear in court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.

(d) A gives B a bond for the repayment of [55][Taka] 1,000 with interest at 12 per cent at the end of six months, with a stipulation that in case of default, interest shall be payable at the rate of 75 per cent from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable.

(e) A, who owes money to B, a money-lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering

---

[51] The word 'Taka' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[52] The word 'Chittagong' was substituted for the word 'Calcutta' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[53] The word 'Taka' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[54] The word 'Taka' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[55] The word 'Taka' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty, and B is only entitled to reasonable compensation in case of breach.

(f) A undertakes to repay B a loan of [56][Taka] 1,000 by five equal monthly installments with a stipulation that, in default of payment of any installment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

(g) A borrows [57][Taka] 100 from B and gives him a bond for [58][Taka] 200, payable by five yearly installments of [59][Taka] 40, with a stipulation that, in default of payment of any installment, the whole shall become due. This is a stipulation by way of penalty.

Party rightfully rescinding contract entitled to compensation

75. A person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfillment of the contract.

Illustration

---

[56] The word 'Taka ' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[57] The word 'Taka ' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[58] The word 'Taka ' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[59] The word 'Taka ' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages, to pay her 100 Taka for each night's performance. On the sixth night, A willfully absents herself from the theatre, and B, in consequence, rescinds the contract. B is entitled to claim compensation for the damage which he has sustained through the non-fulfillment of the contract.

CHAPTER VII

[Sale of Goods]

THIS chapter of the Act, comprising Ss. 76 to 123, is wholly repealed by the Sale of Goods Act, 1930, S. 65, but the numbering of the later chapters and sections is not altered.

CHAPTER VIII
OF INDEMNITY AND GUARANTEE

"Contract of indemnity" defined.

124. A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity."

Illustration

A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 Taka. This is a contract of indemnity.

Rights of indemnity holder when sued.

125. The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor-

(1) all damages which he, may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;

(2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring and defend the suit;

(3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit.

"Contract of guarantee", "surety", "principal debtor", and "creditor".

126. A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default, the person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom, the guarantee is given is called the "creditor". A guarantee may be either oral or written.

Consideration for guarantee.

127. Anything done or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.

Illustrations

(a) B request A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the

goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise.

(b) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise.

(c) A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

Surety's liability.

128. The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

Illustration

A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by C. A is liable not only for the amount of the bill but also for any interest and charges which may have become due on it.

"Continuing guarantee."

129. A guarantee which extends to a series of transactions is called a "continuing guarantee."

Illustrations

(a) A, in consideration that B will employ C in collecting the rent of B's zamindari, promises B to be responsible, to the amount of 5,000 Taka, for the due collection and payment by C of those rents. This is a continuing guarantee.

(b) A guarantees payment to B, a tea-dealer, to the amount of [60][Taka] 100, for any tea he may from time to time supply to C B supplies C with tea to above the value of [61][Taka] 100, and C pays B for it. Afterwards B supplies C with tea to the value of [62][Taka] 200. C fails to pay. The guarantee given by A was a continuing guarantee, and he is accordingly liable to B to the extent of [63][Taka] 100.

(c) A guarantees payment to B of the price of five sacks of flour to be delivered by B to C and to be paid for in a month. B delivers five sacks to C. C pays for them. Afterwards B delivers four sacks to C which C does not pay for. The guarantee given by A was not a continuing guarantee, and accordingly he is not liable for the price of the four sacks.

Revocation of continuing guarantee.

130. A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.

Illustrations

---

[60] The word 'Taka ' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[61] The word 'Taka ' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[62] The word 'Taka ' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[63] The word 'Taka ' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

(a) A, in consideration of B's discounting at A's request, bills of exchange for C, guarantees to B, for twelve months, the due payment of all such bills to the extent of 5,000 Taka. B discounts bills for C to the extent of 2,000 Taka. Afterwards, at the end of three months A revokes the guarantee. This revocation discharges A from all liability to B for any subsequent discount. But A is liable to B for the 2,000 Taka on default of C.

(b) A guarantees to B, to the extent of 10,000 Taka, that C shall pay all the bills that B shall draw upon him. B draws upon C. C accepts the bill. A gives notice of revocation. C dishonours the bill at maturity. A is liable upon his guarantee.

Revocation of continuing guarantee by surety's death.

131. The death of the surety operates, in the absence of any contract to the contrary as a revocation of a continuing guarantee, so far as regards future transactions.

Liability of two persons primarily liable, not affected by arrangement between them that one shall be surety on other's default.

132. Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.

Illustration

A and B make a joint and several promisory note to C. A makes it, in fact, as surety for B, and C knows this at the time when the note is made. The fact that A, to the knowledge of C made the note as surety for B, is no answer to a suit by C against A upon the note.

133. Any variance, made without the surety's consent, in the terms of the contract between the principal [debtor] and the creditor, discharges the surety as to transactions subsequent to the variance.

Discharge of surety by variance in terms of contract.

Illustrations

(a) A becomes surety to C for B's conduct as a manager in C's bank. Afterwards, B and C contract, without A's consent, that B's salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts. B allows a customer to overdraw, and the bank loses a sum of money. A is discharged from his suretyship by the variance made without his consent, and is not liable to make good this loss.

(b) A guarantees C against the misconduct of B in an office to which B is appointed by C, and of which the duties are defined by an Act of the Legislature. By a subsequent Act, the nature of the office is materially altered. Afterwards, B misconducts himself. A is discharged by the change from future liability under his guarantee, though the misconduct of B is in respect of a duty not affected by the later Act.

(c) C agrees to appoint B as his clerk to sell goods at a yearly salary, upon A's becoming surety to C for B's duly accounting for money received by him as such clerk. Afterwards, without A's knowledge or consent, C and B agree that B should be paid by a commission on the goods sold by him and not by a fixed salary. A is not liable for subsequent misconduct of B.

(d) A gives to C a continuing guarantee to the extent of 3,000 Taka for any oil supplied by C to B on credit. Afterwards B becomes embarrased,

and, without the knowledge of A, B and C contract that C shall continue to supply B with oil for ready money; and that the payment shall be applied to the then existing debts between B and C. A is not liable on his guarantee for any goods supplied after this new arrangement.

(e) C contracts to lend B 5,000 Taka on the 1st March. A guarantees repayment. C pays 5,000 Taka to B on the 1st January. A is discharged from his liability, as the contract has been varied in as much as C might sue B for the money before the 1st of March.

Discharge of surety by release or discharge of principal debtor.

134. The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

Illustrations

(a) A gives a guarantee to C for goods to be supplied by C to B. C supplies goods to B, and afterwards B becomes embarrassed and contracts with his creditors (including C) to assign to them his property in consideration of their releasing him from their demands. Here B is released from his debt by the contract with C, and A is discharged from his suretyship.

(b) A contracts with B to grow a crop of indigo on A's land and to deliver it to B at a fixed rate, and C guarantees A's performance of this contract. B diverts a stream of water which is necessary for irrigation of A's land and thereby prevents him from raising the indigo. C is no longer liable on his guarantee.

(c) A contracts with B for a fixed price to build a house for B within a stipulated time, B supplying the necessary timber. C guarantees A's performance of the contract. B omits to supply the timber. C is discharged from his suretyship.

Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor.

135. A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor discharges the surety, unless the surety assents to such contract.

Surety not discharged when agreement made with third person to give time to principal debtor.

136. Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

Illustration

C, the holder of an overdue bill of exchange drawn by A as surety for B, and accepted by B, contracts with M to give time to B, A is not discharged.

Creditor's forbearance to sue does not discharge surety.

137. Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

Illustration

B owes to C a debt guaranteed by A. The debt becomes payable. C does not sue B for a year after the debt has become payable. A is not discharged from his suretyship.

Release of one co-surety does not discharge others.

138. Where there are co-sureties, a release by the creditor of one of them, does not discharge the others, neither does it free the surety so released from his responsibility to the other sureties.

Discharge of surety by creditor's act or omission impairing surety's eventual remedy.

139. If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

Illustrations

(a) B contracts to build a ship for C for a given sum, to be paid by installments as the work reaches certain stages. A becomes surety to C for B's due performance of the contract. C, without the knowledge of A, prepays to B the last two installments. A is discharged by this prepayment.

(b) C lends money to B on the security of a joint and several promissory note made in C's favour by B, and by A as surety for B together with a bill of sale of B's furniture, which gives power to C to sell the furniture, and apply the proceeds in discharge of the note. Subsequently, C sells the furniture, but, owing to his misconduct and wilful negligence, only a small price is realized. A is discharged from liability on the note.

(c) A puts M as apprentice to B, and gives a guarantee to B for M's fidelity. B promises on his part that he will, at least once a month, see M makes up the cash. B omits to see this done as promised, and M embezzles. A is not liable to B on his guarantee.

140. Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.

Rights of surety on payment or performance.

141. A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security; or not and, if the creditor loses, or without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

Surety's right to benefit of creditor's securities.

Illustrations

(a) C advances to B, his tenant, 2,000 Taka on the guarantee of A. C has also a further security for the 2,000 Taka by a mortgage of B's furniture. C cancels the mortgage. B becomes insolvent, and C sues A on his guarantee. A is discharged from liability to the amount of the value of the furniture.

(b) C, a creditor, whose advance to B is secured by a decree, receives also a guarantee for that advance from A. C afterwards takes B's goods in execution under the decree, and then, without the knowledge of A, withdraws the execution. A is discharged.

(c) A, as surety for B, makes a bond jointly with B to C, to secure a loan from C to B. Afterwards, C obtains from B a further security for the same debt. Subsequently, C gives up the further security. A is not discharged.

Guarantee obtained by misrepresentation invalid.

142. Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

Guarantee obtained by concealment invalid.

143. Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid.

Illustrations

(a) A engages B as clerk to collect money for him. B fails to account for some of his receipts, and A in consequence calls upon him to furnish security for his duly accounting. C gives his guarantee for B's duly accounting. A does not acquaint C with B's previous conduct. B afterwards makes default. The guarantee is invalid.

(b) A guarantees to C payment for iron to be supplied by him to B to the amount of 2,000 tons. B and C have privately agreed that B should pay five Taka per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as a surety.

Guarantee on contract that creditor shall not act on it until co-surety joins.

144. Where a person gives a guarantee upon a contract that a creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

Implied promise to indemnify surety.

145. In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

Illustrations

(a) B is indebted to C, and A is surety for the debt. C demands payment from A, and on his refusal sues him for the amount. A defends the suit, having reasonable grounds for doing so, but is compelled to pay the amount of the debt with costs. He can recover from B the amount paid by him for costs, as well as the principal debt.

(b) C lends B a sum of money, and A at the request of B, accepts a bill of exchange drawn by B upon A to secure the amount. C, the holder of the bill, demands payment of it from A, and, on A's refusal to pay, sues him upon the bill. A, not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the bill and costs. He can recover from B the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action.

(c) A guarantees to C, to the extent of 2,000 Taka, payment for rice to be supplied by C to B. C supplies to B rice to a less amount than 2,000 Taka, but obtains from A payment of the sum of 2,000 Taka in respect of the rice supplied. A cannot recover from B more than the price of the rice actually supplied.

Co-sureties liable to contribute equally.

146. Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.

Illustrations

(a) A, B and C are sureties to D for the sum of 3,000 Taka lent to E. E makes default in payment. A, B and C are liable, as between themselves, to pay 1,000 Taka each.

(b) A, B and C are sureties to D for the sum of 1,000 Taka lent to E, and there is a contract between A, B and C that A is to be responsible to the extent of one-quarter, B to the extent of one-quarter and C to the extent of one-half. E makes default in payment. As between the sureties, A is liable to pay 250 Taka, B 250 Taka, and C 500 Taka.

Liability of co-sureties bound in different sums.

147. Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

Illustrations

(a) A, B and C as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 Taka, B in that of 20,000 Taka, C in that of 40,000 Taka, conditioned for D's duly accounting to E.D makes default to the extent of 30,000 Taka. A, B and C are each liable to pay 10,000 Taka.

(b) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 Taka, B in that of 20,000 Taka, C in that of 40,000 Taka, conditioned for D's duly accounting to E. D makes default to the extent of 40,000 Taka. A is liable to pay 10,000 Taka, and B and C 15,000 Taka each.

(c) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in a penalty of 10,000 Taka, B in that

of 20,000 Taka, C in that of 40,000 Taka, conditioned for D's duly accounting to E.D makes default to the extent of 70,000 Taka. A, B and C have to pay each the full penalty of his bond.

CHAPTER IX
OF BAILMENT

"Bailment", "bailor", and "bailee" defined.

148. A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor." The person to whom they are delivered is called the "bailee."

Explanation.- If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor, of such goods although they may not have been delivered by way of bailment.

Delivery to bailee how made.

149. The delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorized to hold them on his behalf.

Bailor's duty to disclose faults in goods bailed.

150. The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.

Illustrations

(a) A lends a horse, which he knows to be vicious, to B. He does not disclose the fact that the horse is vicious. The horse runs away. B is thrown and injured. A is responsible to B for damage sustained.

(b) A hires a carriage of B. The carriage is unsafe, though B is not aware of it, and A is injured. B is responsible to A for the injury.

Care to be taken by bailee.

151. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

Bailee when not liable for loss, etc., of thing bailed.

152. The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in Section 151.

Termination of bailment by bailee's act inconsistent with conditions.

153. A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.

Illustration

A lets to B, for hire, a horse for his own riding. B drives the horse in his carriage. This is, at the option to A, a termination of the bailment.

154. If the bailee makes any use of the goods bailed, which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.

Liability of bailee making unauthorized use of goods bailed.

Illustrations

(a) A lends a horse to B for his own riding only. B allows C, a member of his family, to ride the horse. C rides with care, but the horse accidentally falls and is injured. B is liable to make compensation to A for the injury done to the horse.

(b) A hires a horse in [64][Dhaka] from B expressly to march to [65][Tangail]. A rides with due care, but marches to [66][Narayanganj] instead. The horse accidentally falls and is injured. A is liable to make compensation to B for the injury to the horse.

155. If the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced.

Effect of mixture with bailor's consent, of his goods with bailee's.

---

[64] The word 'Dhaka ' was substituted for the word 'Karachi' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[65] The word 'Tangail ' was substituted for the word 'Hyderabad' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[66] The word 'Narayanganj ' was substituted for the word 'Khairpur' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

Effect of mixture without bailor's consent, when the goods can be separated.

156. If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture.

Illustration

A bails 100 bales of cotton marked with a particular mark to B. B, without A's consent, mixes the 100 bales with other bales of his own, bearing a different mark. A is entitled to have his 100 bales returned, and B is bound to bear all the expense incurred in the separation of the bales, and any other incidental damage.

Effect of mixture, without bailor's consent, when the goods can not be separated

157. If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

Illustration

A bails a barrel of Cape flour worth [67][Taka] 45, to B. B, without A's consent, mixes the flour with country flour of his own, worth only [68][Taka] 25 a barrel. B must compensate A for the loss of his flour.

---

[67] The word 'Taka ' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[68] The word 'Taka ' was substituted for the word 'Rs.' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

158. Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

Repayment by bailor of necessary expenses.

159. The lender of a thing for use may at any time require its return, if the loan was gratuitous, even though he lent it for a specified time or purpose. But, if, on the faith of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived.

Restoration of goods lent gratuitously.

160. It is the duty of the bailee to return, or deliver according to the bailor's direction, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished.

Return of goods bailed on expiration of time or accomplishment of

161. If, by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time.

Bailee's responsibility when goods are not duly returned.

162. A gratuitous bailment is terminated by the death either of the bailor or of the bailee.

Termination of gratuitous bailment by death.

163. In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

Bailor entitled to increase or profit from goods bailed.

Illustration

A leaves a cow in the custody of B to be taken care of. The cow has a calf. B is bound to deliver the calf as well as the cow to A.

Bailor's responsibility to bailee.

164. The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods or to give directions, respecting them.

Bailment by several joint owners.

165. If several joint owners of goods bail them the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary.

Bailee not responsible on redelivery to bailor without title.

166. If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the directions of, the bailor, the bailee is not responsible to the owner in respect of such delivery.

Right of third person claiming goods bailed.

167. If a person, other than the bailor, claims goods bailed, he may apply to the Court to stop the delivery of the goods to the bailor, and to decide the title to the goods.

Right of finder of goods; may sue for specific reward offered.

168. The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner; but he may retain the goods against the owner until he receives such compensation; and, where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it.

When finder of things commonly on sale may sell it.

169. When a thing which is commonly the subject of sale is lost, if the owner cannot with reasonable diligence be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it-

(1) when the thing is in danger of perishing or of losing the greater part of its value, or,

(2) when the lawful charges of the finder, in respect of the thing found, amount to two-thirds of its value.

Bailee's particular lien.

170. Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.

Illustrations

(a) A delivers a rough diamond to B, a jeweller, to be cut and polished, which is accordingly done. B is entitled to retain the stone till he is paid for the services he has rendered.

(b) A gives cloth to B, a tailor, to make into a coat. B promises A to deliver the coat as soon as it is finished, and to give A three months' credit for the price. B is not entitled to retain the coat until he is paid.

General lien of bankers, factors, wharfingers, attorneys and policy-brokers.

171. Bankers, factors, wharfingers, [69][Advocate of a Supreme Court] and policy-brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect.

---

[69] The words 'Advocate of a Supreme Court ' were substituted for the words 'attorneys of a High Court' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

"Pledge," "pawnor," and "pawnee" defined.

172. The bailment of goods as security for payment of a debt or performance of a promise is called "pledge". The bailor is in this case called the "pawnor". The bailee is called the "pawnee."

Pawnee's right of retainer.

173. The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

Pawnee not to retain for debt or promise other than that for which goods pledged. Presumption in case of subsequent advances.

174. The pawnee shall not, in the absence of a contract to that effect retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee.

Pawnee's right as to extraordinary expenses incurred.

175. The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.

Pawnee's right where pawnor makes default.

176. If the pawnor makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

177. If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them; but he must, in that case, pay, in addition, any expenses which have arisen from his default.

Defaulting pawnor's right to redeem.

178. Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has not authority to pledge.

Pledge by mercantile agent.

Explanation.- In this section the expressions 'mercantile agent' and 'documents of title' shall have the meanings assigned to them in the Sale of Goods Act, 1930.

178A. When the pawnor has obtained possession of the goods pledged by him under a contract voidable under section 19 or Section 19A, but the contract has not been rescinded at the time of the pledge, the pawnee acquires a good title to the goods, provided he acts in good faith and without notice of the pawnor's defect of title.

Pledge by person in possession under voidable contract.

179. Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

Pledge where pawnor has only a limited interest

Suits by Bailees or Bailors against Wrong-doers.

Suit by bailor or bailee against wrongdoer.

180. If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

Apportionment of relief or compensation obtained by such suits.

181. Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.

CHAPTER X
AGENCY

Appointment and Authority of Agents

"Agent" and "principal" defined.

182. An "agent" is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the "principal".

Who may employ agent.

183. Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.

Who may be an agent.

184. As between the principal and third persons any person may become an agent, but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained.

Consideration not necessary.

185. No consideration is necessary to create an agency.

186. The authority of an agent may be expressed or implied. Agent's authority may be expressed or implied.

187. An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case. Definition of express and implied authority.

Illustration

A owns a shop in [70][Mymensingh], living himself in [71][Dhaka] and visiting the shop occasionally. The shop is managed by B, and he is in the habit of ordering goods from C in the name of A for the purposes of the shop, and of paying for them out of A's funds with A's knowledge. B has an implied authority from A to order goods from C in the name of A for the purposes of the shop.

188. An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act. Extent of agent's authority.

An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purposes, or usually done in the course of conducting such business.

Illustrations

---

[70] The word 'Mymensing ' was substituted for the word 'Serampur' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[71] The word 'Dhaka' was substituted for the word 'Calcutta' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

(a) A is employed by B, residing in London, to recover at [72][Chittagong], a debt due to B. A may adopt any legal process necessary for the purpose of recovering the debt, and may give a valid discharge for the same.

(b) A constitutes B his agent to carry on his business of a ship-builder. B may purchase timber and other materials, and hire workmen, for the purposes of carrying on the business.

Agent's authority in an emergency.

189. An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances.

Illustrations

(a) An agent for sale may have goods repaired if it be necessary.

(b) A consigns provisions to B at [73][Chittagong], with directions to send them immediately to C at [74][Dhaka], B may sell the provisions at [75][Chittagong] if they will not bear the journey to [76][Dhaka] without spoiling.

---

[72] The word 'Chittagong ' was substituted for the word 'Karachi' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[73] The word 'Chittagong ' was substituted for the word 'Karachi' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[74] The word 'Dhaka' was substituted for the word 'Calcutta' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[75] The word 'Chittagong ' was substituted for the word 'Karachi' by the Bangladesh Laws (Revision and Declaration) Act, 1973

Sub-Agents

190. An Agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or from the nature of the agency, a sub-agent must, be employed.

When agent cannot delegate.

191. A "Sub-agent" is a person employed by, and acting under the control of, the original agent in the business of the agency.

"Sub-agent" defined.

192. Where a sub-agent is properly appointed, the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for his acts, as if he were an agent originally appointed by the principal.

Representation of principal by sub-agent properly appointed.

The agent is responsible to the principal for the acts of the sub-agent.

The sub-agent is responsible for his acts to the agents, but not to the principal, except in case of fraud or willful wrong.

193. Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, the agent stands towards such person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons; the principal is not represented by or responsible for the acts of the person so employed, nor is that person responsible to the principal.

Agent's responsibility for sub-agent appointed without authority.

(Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[7b] The word 'Dhaka' was substituted for the word 'Calcutta' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

Relation between principal and person duly appointed by agent to act in business of agency.

194. Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

Illustrations

(a) A directs B, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. B names C, an auctioneer, to conduct the sale. C is not a sub-agent, but is A's agent for the conduct of the sale.

(b) A authorizes B, a merchant in [Chittagong], to recover the moneys due to A from C & Co. B instructs D, a solicitor, to take legal proceedings against C & Co. for the recovery of the money. D is not a sub-agent, but is solicitor for A.

Agent's duty in naming such person.

195. In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and, if he does, this, he is not responsible to the principal for the acts or negligence of the agent so selected.

Illustrations

(a) A instructs B, a merchant, to buy a ship for him. B employs a ship surveyor of good reputation to choose a ship for A. The surveyor makes the choice negligently and the ship turns out to be unseaworthy and is lost. B is not, but the surveyor is, responsible to A.

(b) A consigns goods to B, a merchant, for sale. B in due course, employs an auctioneer in good credit to sell the goods of A, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. B is not responsible to A for the proceeds.

Ratification

Right of person as to acts done for him without his authority. Effect of ratification.

196. Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratify them, the same effects will follow as if they had been performed by his authority.

Ratification may be expressed or implied.

197. Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.

Illustrations

(a) A, without authority, buys goods for B. Afterwards B sells them to C on his own account; B's conduct implies a ratification of the purchase made for him by A.

(b) A without B's authority, lends B's money to C. Afterwards B accepts interest on the money from C. B's conduct implies a ratification of the loan.

Knowledge requisite for valid ratification.

198. No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

Effect of ratifying unauthorized act forming part of a transaction.

199. A person ratifying any unauthorized act done on his behalf ratifies the whole of the transaction of which such act formed a part.

Ratification of unauthorized act cannot injure third person.

200. An act done by one person on behalf of another, without such other person's authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect.

Illustrations

(a) A not being authorized thereto by B, demands on behalf of B the delivery of a chattel, the property of B from C who is in possession of it. This demand cannot be ratified by B, so as to make C liable for damages for his refusal to deliver.

(b) A holds a lease from B terminable on three months' notice. C, an unauthorized person, gives notice of termination to A. The notice cannot be ratified by B, so as to be binding on A.

Revocation of Authority

Termination of agency.

201. An agency is terminated by the principal revoking his authority; or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.

Termination of agency where agent has an interest in subject-matter.

202. Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

Illustrations

(a) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority nor can it be; terminated by his insanity or death.

(b) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself, out of the price, the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or death.

When principal may revoke agent's authority.

203. The principal may, save as is otherwise provided by the last preceding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.

Revocation where authority has been partly exercised.

204. The principal cannot revoke the authority given to his agent after the authority has been partly exercised so far as regards such acts and obligations as arise from acts already done in the agency.

Illustrations

(a) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's money remaining in B's hands. B buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton.

(b) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's moneys remaining in B's hands. B buys 1,000 bales of cotton in A's name and so as not to render himself personally liable for the price. A can revoke B's authority to pay for the cotton.

Compensation for revocation by principal or renunciation by agent.

205. Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

Notice of revocation of renunciation.

206. Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

Revocation and renunciation may be expressed or implied.

207. Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively.

Illustration

A empowers B to let A's house. Afterwards A lets it himself. This is an implied revocation of B's authority.

When termination of agent's authority takes effect as to agent, and as to third persons.

208. The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.

Illustrations

(a) A directs B to sell goods for him, and agrees to give B five per cent commission on the price fetched by the goods. A afterwards, by letter, revokes B's authority. B, after the letter is sent, but before he receives it, sells the goods for 100 Taka. The sale is binding on A, and B is entitled to five Taka as his commission.

(b) A, at [77][Dhaka], by letter, directs B to sell for him some cotton lying in a warehouse in [78][Rajshahi], and afterwards, by letter, revokes his authority to sell, and directs B to send the cotton to [79][Dhaka]. B, after receiving the second letter, enters into a contract with C, who knows of the first letter, but not of the second, for the sale to him of the cotton. C pays B the money, with which B absconds. C's payment is good as against A.

(c) A directs B, his agent, to pay certain money to C. A dies, and D takes out probate to his will. B, after A's death, but before hearing of it, pays the money to C. The payment is good as against D, the executor.

Agent's duty on termination of agency by principal's death or insanity.

209. When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

Termination of sub-agent's authority.

210. The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.

---

[77] The word 'Dhaka' was substituted for the word 'Calcutta' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[78] The word 'Rajshahi' was substituted for the word 'Madras' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

[79] The word 'Dhaka' was substituted for the word 'Calcutta' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

Agent's Duty to Principal

Agent's duty in conducting principal's business.

211. An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.

Illustrations

(a) A, an agent engaged in carrying on for B a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to make such investments. A must make good to B the interest usually obtained by such investments.

(b) B, a broker, in whose business it is not the custom to sell on credit, sells goods of A on credit to C, whose credit at the time was very high. C before payment, becomes insolvent. B must make good the loss to A.

Skill and diligence required from agent.

212. An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct.

Illustrations

(a) A, a merchant in [Chittagong], has an agent, B, in London to whom a sum of money is paid on A's account, with orders to remit. B retains the money for a considerable time. A, in consequence of not receiving the money, becomes insolvent. B is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss as e.g., by variation of rate of exchange but not further.

(b) A, an agent for the sale of goods, having authority to sell on credit, sells to B on credit, without making the proper and usual enquiries as to the solvency of B. B, at the time of such sale, is insolvent. A must make compensation to his principal in respect of any loss thereby sustained.

(c) A, an insurance-broker, employed by B to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. A is bound to make good the loss to B.

(d) A, a merchant in England, directs B, his agent at [80][Chittagong] who accepts the agency, to send him 100 bales of cotton by a certain ship. B, having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. B is bound to make good to A, the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.

---

[80] The word 'Chittagong' was substituted for the word 'Karachi' by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act No. VIII of 1973), as amended by the Bangladesh Laws (Revision and Declaration) (Amendment) Act, 1974 (Act No. LIII of 1974).

Agent's accounts.

213. An agent is bound to render proper accounts to his principal on demand.

Agent's duty to communicate with principal.

214. It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.

Right of principal when agent deals, on his own account, in business of agency without principal's consent.

215. If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

Illustrations

(a) A directs B to sell A's estate. B buys the estate for himself in the name of C. A, on discovering that B has bought the estate for himself, may repudiate the sale, if he can show that B has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.

(b) A directs B to sell A's estate. B, on looking over the estate before selling it, finds a mine on the estate which is unknown to A. B informs A that he wishes to buy the estate for himself, but conceals the discovery of the mine. A allows B to buy in ignorance of the existence of the mine. A on discovering that B knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

Principal's right to benefit gained by agent dealing on his own account in business of agency.

216. If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

Illustration

A directs B, his agent, to buy a certain house for him. B tells A it cannot be bought, and buys the house for himself. A may, on discovering that B has bought the house, compel him to sell it to A at the price he gave for it.

Agent's right of retainer out of sums received on principal's account.

217. An agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.

Agent's duty to pay sums received for principal.

218. Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

When agent's remuneration becomes due.

219. In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.

Agent not entitled to remuneration for business misconducted

220. An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business which he has misconducted.

Illustrations

(a) A employs B to recover 1,00,000 Taka from C and to lay it out on good security. B recovers the 1,00,000 Taka and lays out 90,000 Taka on good security, but lays out 10,000 Taka on security which he ought to have known to be bad, whereby A loses 2,000 Taka. B is entitled to remuneration for recovering the 1,00,000 Taka and for investing the 90,000 Taka. He is not

entitled to any remuneration for investing the 10,000 Taka, and he must make good the 2,000 Taka to B [sic in the Act, but it should obviously be A].

(b) A employs B to recover 1,000 Taka from C. Through B's misconduct the money is not recovered. B is entitled to no remuneration for his services, and must make good the loss.

Agent's lien on principal's property.

221. In the absence of any contract to the contrary an agent is entitled to retain goods, papers and other property, whether moveable or immovable, of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him.

Principal's Duty to Agent

Agent to be indemnified against consequences of lawful acts.

222. The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

Illustrations

(a) B, at Singapore, under instructions from A, of [81][Chittagong], contracts with C to deliver certain goods to him. A does not send the goods to B and C sues B for breach of contract. B informs A of the suit, and A authorizes him to defend the suit. B defends the suit, and is compelled to pay damages and costs, and incurs expenses. A is liable to B for such damages, costs, and expenses.

---

[81] The word "Chittagong" was substituted for the word "Karachi" by Act VIII of 1973, Second schedule (with effect from 26-3-71).

(b) B, a broker at [82][Chittagong], by the orders of A, a merchant there, contracts with C for the purchase of 10 casks of oil for A. Afterwards A refuses to receive the oil, and C sues B. B informs A, who repudiates the contracts altogether. B defends, but unsuccessfully, and has to pay damages and costs and incurs expenses. A is liable to B for such damages, costs, and expenses.

Agent to be indemnified against consequences of acts done in good faith.

223. Where one person employees another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it cause an injury to the rights of third persons.

Illustrations

(a) A, a decree-holder and entitled to execution of B's goods, requires the officer of the Court to seize certain goods, representing them to be the goods of B. The officer seizes the goods, and is sued by C, the true owner of the goods. A is liable to indemnify the officer for the sum which he is compelled to pay to C in consequence of obeying A's directions.

(b) B, at the request of A, sells goods in the possession of A, but which A had no right to dispose of. B does not know this, and hands over the proceeds of the sale to A. Afterwards C, the true owner of the goods, sues B and recovers the value of the goods and costs. A is liable to indemnify B for what he has been compelled to pay to C, and for B's own expenses.

---

[82] Ibid.

Non-liability of employer of agent to do a criminal act.

224. Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.

Illustrations

(a) A employs B to beat C, and agrees to indemnify him against all consequences of the act. B thereupon beats C, and has to pay damages to C for so doing. A is not liable to indemnify B for those damages.

(b) B, the proprietor of a newspaper, publishes, at A's request, a libel upon C in the paper, and A agrees to indemnify B against the consequences of the publication, and all costs and damages of any action in respect thereof. B is sued by C and has to pay damages, and also incurs expenses. A is not liable to B upon the indemnity.

Compensation to agent for injury caused by principal's neglect.

225. The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill.

Illustration

A employees B as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskillfully put up, and B is in consequence hurt. A must make compensation to B.

Effect of agency on contracts with third Persons

Enforcement and consequences of agent's contracts.

226. Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences, as if the contracts had

been entered into and the acts done by the principal in person.

Illustrations

(a) A buys goods from B, knowing that he is an agent for their sale, but not knowing who is the principal. B's principal is the person entitled to claim from A the price of the goods, and A cannot, in a suit by the principal, set off against that claim a debt due to himself from B.

(b) A being B's agent, with authority to receive money on his behalf, receives from C a sum of money due to B. C is discharged of his obligation to pay the sum in question to B.

Principal how far bound, when agent exceeds authority.

227. When an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority is binding as between him and his principal.

Illustration

A, being owner of a ship and cargo, authorizes B to procure an insurance for 4,000 Taka on the ship. B procures a policy for 4,000 Taka on the ship, and another for the like sum on the cargo. A is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

Principal not bound when excess of agent's authority is not separable.

228. Where an agent does more than he is authorized to do, and what he does beyond the scope of his authority cannot be separated, from what is within it, the principal is not bound to recognize the transaction.

Illustration

A authorizes B to buy 500 sheep for him. B buys 500 sheep and 200 lambs for one sum of 6,000 Taka. A may repudiate the whole transaction.

Consequences of notice given to agent.

229. Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequences as if it had been given to or obtained by the principal.

Illustrations

(a) A is employed by B to buy from C certain goods, of which C is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, A learns that the goods really belonged to D, but B is ignorant of that fact. B is not entitled to set off a debt owing to him from C against the price of the goods.

(b) A is employed by B to buy from C goods of which C is the apparent owner. A was, before he was so employed, a servant of C, and then learnt that the goods really belonged to D, but B is ignorant of that fact. In spite of the knowledge of his agent, B may set off against the price of the goods a debt owing to him from C.

Agent cannot personally enforce, nor be bound by, contracts on behalf of principal.

230. In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him, on behalf of his principal, nor is he personally bound by them.

Such a contract shall be presumed to exist in the following cases:-- Presumption of contract to contrary

(1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;

(2) where the agent does not disclose the name of his principal;

(3) where the principal, though disclosed, cannot be sued.

231. If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal. Rights of parties to a contract made by agent not disclosed.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfill the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

232. Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract. Performance of contract with agent supposed to be principal.

Illustration

A, who owes 500 Taka to B, sells 1,000 Taka, worth of rice to B. A is acting as agent for C in the transaction, but B has no knowledge nor reasonable ground of suspicion that such is the case. C cannot compel B to take the rice without allowing him to set off A's debt.

Right of person dealing with agent personally liable.

233. In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable.

Illustration

A enters into a contract with B to sell him 100 bales of cotton, and afterwards discovers that B was acting as agent for C. A may sue either B or C, or both, for the price of the cotton.

Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable.

234. When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

Liability of pretended agent.

235. A person untruly representing himself to be the authorized agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.

Person falsely contracting as agent not entitled to performance.

236. A person with whom a contract has been entered into in the character of agent is not entitled to require the performance of it if he was in reality acting, not as agent, but on his own account.

237. When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

Liability of principal inducing belief that agent's unauthorized acts were authorized.

Illustrations

(a) A consigns goods to B for sale, and gives him instructions not to sell under a fixed price. C, being ignorant of B's instructions, enters into a contract with B to buy the goods at a price lower than the reserved price. A is bound by the contract.

(b) A entrusts B with negotiable instruments indorsed in blank. B sells them to C in violation of private orders from A. The sale is good.

238. Misrepresentation made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals; but misrepresentations made, or frauds committed, by agents, in matter which do not fall within their authority, do not affect their principals.

Effect on agreement, of misrepresentation or fraud by agent.

Illustrations

(a) A, being B's agent for the sale of goods, induces C to buy them by a misrepresentation, which he was not authorized by B to make. The contract is voidable, as between B and C, at the option of C.

(b) A, the captain of B's ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between B and the pretended consignor.

CHAPTER X
OF PATNERSHIP

This chapter (Ss. 239 to 266) has been repealed by the Partnership Act, 1932, S. 73 and Sch. II.

SCHEDULE

Repealed by the Repealing and Amending Act, 1914 (X of 1914) s. 3 and Sch. II.

A

abandonment · 113
abatement · 180
absolute · 34, 41, 42, 45, 84, 104, 146, 147, 149, 152, 155, 174, 278, 285, 292
absolute · 41, 42
abstain · 5, 7, 15, 16, 22, 114, 117, 118, 123, 126
abstinence · 5, 6, 7, 15, 26, 114, 123, 126
acceptance · 7, 8, 10, 18, 19, 23, 25, 26, 28, 30, 33, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 184, 198, 201
act or omission · 65, 66, 80, 99, 102, 263, 265
actual loss · 130, 246
adequate · 6, 86, 115, 123
administrator · 160
Admiralty Jurisdiction · 244
advertisement · 21, 27, 28, 35, 36, 37, 52
Advocate of the Supreme Court · 284
affection · 119, 120
age · 73, 74, 78, 80, 81, 82, 85, 92, 94, 99, 212, 309, 310
agency · 2, 308, 309, 311, 312, 314, 315, 317, 319, 320, 322, 323, 324, 325, 326, 328, 329, 330, 331, 332, 334, 335, 337
agent · 53, 68, 99, 100, 121, 128, 291, 292, 305, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350
agreement · 3, 4, 5, 8, 9, 11, 13, 14, 15, 18, 24, 25, 28, 53, 73, 77, 78, 79, 81, 82, 83, 88, 90, 91, 94, 98, 100, 103, 104, 105, 106, 110, 111, 112, 113, 117, 119, 120, 123, 124, 125, 126, 127, 128, 129, 130, 131, 133, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 152, 153, 155, 156, 157, 158, 159, 160, 161, 162, 165, 170, 171, 183, 186, 201, 202, 207, 210, 211, 212, 220, 241, 246, 251, 256, 264, 269, 285, 286, 291, 292, 350
agreements · 3, 4, 8, 13, 78, 83, 119, 130, 132, 138, 141, 142, 143, 144, 146, 147, 160, 161, 170, 171, 350
ambiguity · 19, 237
Anson, William · 20, 72
arbitration · 135, 148, 149, 155, 156, 157
assent · 7, 15, 26, 40, 45, 48, 49, 53, 54, 180, 206, 268, 269
asylum · 76
auctioneer · 27, 28, 52, 318, 319
auctions · 27

B

bailee · 274, 275, 276, 277, 278, 279, 280, 281, 282, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 306
bailment · 2, 274, 275, 276, 278, 279, 280, 281, 282, 287, 288, 289, 292, 295, 296, 297, 299, 300
bailor · 274, 275, 276, 277, 278, 279, 280, 281, 284, 286, 287, 288, 292, 293, 294, 295, 296, 297, 298, 299, 300
bainapatra · 137
Bangladesh · 1, 5, 15, 38, 44, 58, 63, 64, 74, 77, 78, 79, 80, 81, 83, 87, 91, 110, 112, 129, 150, 156, 208, 216, 217, 227, 243, 250, 259, 310
bidder · 27, 28, 29, 31
bilateral mistake · 112
bodily · 92, 94
bona fide · 133, 183
breach of contract · 3, 18, 32, 46, 90, 151, 179, 230, 231, 236, 237, 238, 239, 241, 244, 246, 338
burden of proof · 95, 96, 97
business transaction · 9, 25

C

Cambridge · 86
capacity of parties · 226
case · 3, 11, 12, 14, 18, 20, 21, 22, 25, 26, 28, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 43, 46, 48, 50, 56, 57, 58, 59, 60, 62, 63, 68, 69, 71, 72, 74, 75, 77, 79, 80, 81, 82, 83, 86, 87, 94, 95, 99, 101, 104, 106, 109, 113, 115, 118, 119, 123, 124, 130, 131, 132, 133, 134, 135, 136, 137, 150, 151, 152, 154, 155, 158, 159, 161, 162, 163, 168, 173, 174, 175, 179, 180, 181, 182, 183, 184, 185, 189, 190, 198, 199, 202, 204, 207, 212, 216, 217, 218, 222, 226, 228, 229, 230, 237, 242, 243, 244, 245, 246, 251, 252, 253, 254, 255, 268, 270, 271, 275, 276, 278, 279, 282, 283, 286, 287, 288, 289, 291, 292, 295, 299, 300, 301, 303, 305, 311, 313, 315, 318, 319, 321, 324, 325, 326, 327, 329, 334, 335, 343, 345, 346, 347, 348
caveate emptor · 108, 109
classic illustration · 49, 51, 72
coercion · 89, 90, 91, 95, 97, 105, 106, 228
commercial impossibility · 217
commission · 102, 108, 160, 161, 261, 327, 338
communication of acceptance · 56, 57, 61, 63, 64, 66, 67, 72
communication of notice of revocation · 67, 68
communication of offer · 23, 39, 58
communication of proposal · 55
communication of revocation · 55, 63, 65
compensation · 114, 115, 123, 162, 163, 180, 184, 194, 195, 196, 197, 198, 200, 201, 210, 211, 212, 227, 228, 230, 231, 232,

233, 234, 235, 236, 238, 241, 242, 244, 245, 246, 247, 248, 250, 278, 280, 281, 288, 293, 296, 297, 299, 306, 326, 331, 332, 333, 340, 341, 349
compromise · 97, 131, 135, 137, 207, 252, 254
compulsion · 97
condition precedent · 67, 70, 130
conditional · 22, 70, 145, 165, 199, 255
conduct · 21, 22, 25, 53, 80, 168, 179, 249, 250, 261, 269, 318, 320, 327, 329, 330, 331, 332, 350
consequences · 18, 39, 45, 112, 138, 176, 177, 180, 195, 197, 200, 201, 209, 210, 215, 248, 249, 251, 315, 316, 330, 331, 338, 339, 340, 341, 344
consideration · 5, 6, 8, 9, 11, 49, 50, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 133, 134, 135, 137, 138, 139, 141, 142, 143, 144, 165, 188, 207, 211, 212, 214, 246, 251, 256, 257, 258, 263, 311
consignee · 228, 291
consignment · 221, 223, 224, 229, 291
constituent element · 23, 250
contingent · 144, 161, 164, 165, 166, 167, 168, 169, 170, 171
contingent agreement · 161
contingent contract · 161, 164
continuing guarantee · 257, 258
Contract Act, 1872, · 1, 3, 15, 23, 24, 39, 40, 54, 73, 78, 79, 87, 88, 90, 113, 119, 126, 140, 164, 255, 308
contract of guarantee · 249, 251, 255, 256
contract of indemnity · 249, 250, 251, 252, 253
contractual · 2, 29, 32, 36, 84, 87, 97, 173, 174, 220, 225
contractual obligations · 2, 29, 36, 173
Corporation · 57, 156, 218, 229, 242, 244
co-sureties · 265, 271, 272
counter offer · 45, 46, 47
Court of Appeal · 28, 32, 34, 138, 249
Court of Exchequer Chamber · 44
Court of Wards · 74
creditor · 121, 203, 204, 205, 208, 251, 255, 257, 258, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 285, 304
criminal prosecution · 134
criteria · 13, 78, 88, 310
Crown · 49, 134
customer · 20, 33, 34, 35, 107, 261, 285

D

damages · 28, 32, 46, 157, 180, 237, 238, 239, 241, 243, 250, 252, 253, 286, 287, 322, 338, 339, 340
death · 67, 70, 106, 173, 174, 175, 184, 185, 188, 258, 259, 300, 323, 324, 328
debtor · 123, 202, 203, 204, 205, 206, 251, 255, 256, 257, 260, 262, 263, 264,

265, 266, 267, 268, 270, 271, 285, 304
deceased person · 160, 188
deceptive · 100
declaration of assurance · 30
defendants · 23, 29, 31, 32, 33, 36, 51, 82, 154, 222, 223
definition · 3, 4, 5, 6, 7, 8, 12, 13, 15, 16, 17, 20, 21, 22, 23, 40, 42, 90, 100, 114, 115, 116, 121, 123, 126, 214, 309
delivery of possession · 41, 216, 275, 276
display of goods · 33, 34, 35
distinction · 13, 24, 27, 71
distress · 92, 94
doctor and patient · 94
doctrine of 'estoppel' · 80
doctrine of 'frustration of contract' · 217
drunkenness · 75

E

earthquake · 216
ekramama · 117, 183
enforceable by law · 3, 4, 8, 11, 12, 13, 14, 81, 121, 140, 141, 142, 158, 166, 201, 210, 230
English law · 15, 27, 49, 58, 62, 63, 64, 68, 77, 78, 85, 154
English law cases · 27
essential elements · 114, 126
estoppel · 79, 81
evidence · 23, 44, 80, 86, 91, 92, 96, 97, 118, 133, 134, 185, 243, 283, 290
executed consideration · 118, 119
executor · 160, 328
Executory consideration · 118
Express authority · 311
express offer · 21, 22
Express ratification · 321
express warranty · 243
extraordinary expenses · 302

F

fiduciary · 92, 94, 97
finder of goods · 306
formation of a contract · 1, 10, 24, 25, 54, 172, 173
fraud · 89, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 128, 131, 315, 316, 350
fundamental necessity · 83

G

gratuitous bailment · 279, 299
gravity · 124
guarantee · 2, 160, 249, 251, 254, 255, 256, 257, 258, 259, 261, 263, 264, 266, 267, 268, 269, 270, 271
guardian · 160

H

heir · 160
House of Lords · 26, 30, 54, 62

I

iddah · 145
idiocy · 75
illness · 85, 92, 94
immovable property · 102, 183, 198, 212, 217, 220, 274
Implied authority · 311
Implied ratification · 321
inadequate · 6, 115, 123, 125
Income tax · 199

indemnifier · 250, 251, 252, 254
indemnity · 2, 249, 250, 251, 252, 253, 254, 286, 340
indemnity holder · 250, 252
Indian Supreme Court · 58
Initial · 162
injury · 127, 130, 131, 277, 278, 287, 293, 298, 339, 340
innocent · 101
insanity · 67, 70, 324, 328
Intel Pentium III computer · 103
intention · 16, 18, 19, 23, 26, 51, 56, 90, 91, 99, 100, 101, 102, 104, 130, 147, 173, 174, 175, 180, 181, 182, 184, 185, 186, 188, 197, 198, 200, 201, 243, 304, 312
inter alia · 20, 25, 26, 32, 37, 51, 147
interest · 29, 39, 75, 76, 93, 98, 106, 109, 115, 157, 183, 188, 219, 235, 236, 241, 242, 244, 245, 257, 293, 300, 301, 304, 306, 310, 312, 320, 322, 323, 324, 325, 329, 331
invitation to treat · 24, 25, 26, 27, 28, 32, 33, 34, 35, 36, 38
ipso facto · 70
Islamic law · 145

J

joint promisees · 176, 177
judicial debate · 27
judicial pronouncements 24, 45
jurisprudence · 208

K

Kabinnamah · 145

L

lapse of time · 67, 68
lawyer and client · 94
legal consequence · 65, 71, 147, 173, 211, 263, 342, 346
Lexus · 20
lien · 281, 282, 283, 284, 285, 338
literal terms · 145
lucid interval · 76
lunacy · 75, 76

M

Magistrate · 137
market price · 232, 235, 240, 242, 243, 269
Martial Law Regulation · 221, 222
material fact · 91, 104, 334, 335
medical treatment · 86
mental · 92, 94
minor · 78, 79, 80, 81, 82, 83, 84, 86, 87, 131, 144, 145, 160, 212, 225, 226
miscarriage · 249, 252
mischief · 132, 133, 134, 135, 152, 154, 220
misrepresentation · 81, 89, 100, 103, 104, 105, 106, 107, 108, 109, 113, 268, 269, 350
mistake · 39, 89, 103, 104, 110, 111, 112, 113, 143, 227, 228, 229
mistake of fact · 111
mistake of law · 111, 112
moral · 85, 97
mortgaged property · 212
mukhtar · 129
Muslim · 129, 145

N

natural love · 119, 120

nature of property · 199
necessaries · 84, 85, 86, 87, 225, 226
nephew · 22, 48, 52, 53
non-performance · 174, 176, 184, 196, 198, 213
non-performance of the promise · 198
notice of revocation · 67, 259
novatio · 206
nuisance · 124

O

obiter dicta · 28, 38
offer · 7, 8, 10, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 56, 58, 59, 60, 66, 67, 68, 70, 72, 136, 172, 173, 174, 175, 176, 177, 178, 179, 184
offeree · 7, 22, 23, 25, 45, 48, 50, 52, 62, 70
offeror · 7, 20, 25, 28, 42, 45, 47, 52, 60, 62, 63, 65
opposed to public policy · 131
Onus · 95
oppression · 97
ordinary diligence · 105, 107, 108
ordinary prudence · 108, 109, 238, 289, 290, 313, 318, 319, 329
ordinary tribunals · 148, 150, 152, 153
original offer · 46

P

parents and child · 94
pari delicto · 135
past consideration · 118, 121
pawnee · 300, 301, 302, 303, 304, 305
pawnor · 300, 302, 303, 304, 305, 306
Penal Code, 1860 · 90, 91, 94, 129, 137, 160
performance · 2, 19, 49, 50, 51, 52, 71, 83, 116, 118, 137, 148, 160, 162, 163, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 186, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 201, 207, 208, 209, 211, 213, 214, 215, 216, 217, 219, 220, 222, 231, 233, 238, 244, 248, 263, 265, 266, 300, 302, 305, 336, 337, 347, 348, 349
permanent settlement · 159
personal contracts · 183
personal representative · 160
personal skill · 71, 175, 182
plaintiff · 28, 29, 34, 36, 47, 48, 50, 51, 52, 53, 57, 69, 86, 97, 113, 115, 116, 117, 118, 124, 125, 131, 134, 137, 148, 154, 155, 156, 212, 219, 220, 221, 222, 223, 224, 239, 241, 282, 283, 285, 292, 346
pledge · 2, 300, 302, 305, 306
policy-brokers · 284
polygamy · 145, 163
presumption · 96, 301, 346
principal · 128, 135, 154, 186, 235, 237, 251, 255, 256, 257, 260, 262, 263, 264, 265, 266, 267, 268, 270, 271, 308, 309, 310, 311, 312, 313, 315, 316, 317, 318, 319, 322, 323,

the Limitation Act, 1908 · 122, 151
the Majority Act, 1875 · 74, 310
the Stamp Act, 1899 · 122
the Transfer of Property Act, 1882 · 102
time barred debt · 121, 122, 204, 205
TO-LET · 26
trespass · 130
tribunals · 152
'two-contract analysis' · 32

U

uncertainty · 19, 157, 158
unconditional · 22, 70, 122, 176, 178
unconscionable · 92, 93, 95, 96, 97
undue influence · 89, 91, 92, 93, 94, 95, 96, 97, 98
unfair advantage · 92, 93, 95, 96, 97
unforeseen event · 215
unilateral contracts · 31
unilateral mistake · 112
unqualified · 41, 42, 45
unsound mind · 9, 74, 75, 76, 77, 322, 323, 328

V

void *ab initio* · 12, 13, 79, 81, 83, 135, 136
void agreement · 13, 14, 140, 142, 162
voidable · 11, 65, 77, 78, 79, 98, 105, 106, 107, 108, 110, 111, 112, 143, 194, 195, 197, 198, 200, 201, 210, 213, 296, 305, 350
voluntary service · 120, 121

W

wager · 144, 159
warehouse · 176, 189, 328
wharfingers · 284
willingness · 7, 15, 16, 17, 18, 21, 22, 23, 25, 35, 54, 99, 100, 104, 151
written · 21, 38, 115, 120, 122, 159, 255, 283, 284, 311

324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 338, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349
principal debtor · 255, 257, 263, 264, 266, 270, 271
principle of law · 47, 80, 256
proposal · 6, 7, 10, 15, 16, 18, 19, 20, 21, 22, 23, 39, 40, 41, 42, 43, 44, 45, 50, 52, 54, 55, 57, 63, 65, 66, 67, 71, 140, 213
proposer · 16, 18, 43, 44, 54, 56, 57, 60, 66, 67, 68, 70, 72
psychological element · 90, 91, 100
public policy · 127, 130, 131, 132, 133, 134, 157

Q

quality · 109, 124, 176, 179, 231, 234, 240, 289
quantity · 36, 86, 124, 179, 222, 233

R

reasonable opportunity · 176, 178, 179
reasonable standard · 328
reasonable time · 43, 44, 67, 69, 178, 179, 189
reciprocal promises · 192, 193, 194, 195, 197, 201
religious information · 85
remuneration · 118, 279, 281, 282, 283, 284, 288, 336, 337, 338
requirement · 6, 51, 73, 74, 77, 88, 93, 116, 119, 147
rescission · 205, 210, 213
restraint of legal proceedings · 144, 148, 149, 155
restraint of marriage · 144, 145
restraint of trade · 144, 145, 146, 147, 148
right to property · 130
rule of law · 76, 79, 243

S

salami · 158, 159
signed · 53, 121, 122, 131, 346
solenama · 131
sound mind · 73, 74, 75, 76, 77, 309, 310
spiritual · 97
state · 74, 80, 85, 137, 238
State Acquisition and Tenancy Act · 219
statement · 17, 19, 24, 25, 26, 42, 43, 46, 80, 81, 101, 103, 104, 159
sub-agents · 315, 329
subsequent · 162, 215
substantial element · 90, 100
Supreme Court of South Africa · 50
surety · 186, 251, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271
suretyship · 251, 259, 261, 263, 265, 267
surrounding circumstances · 199
survive · 83, 87
survivor · 184, 188

T

teacher and student · 94
telegram · 23, 44, 46, 55, 63
tender · 28, 29, 30, 31, 32, 57, 172, 174